No. 04-1140

Title: Gerald T. Martin, et ux., Petitioners
v.
Franklin Capital Corporation, et al.

Docketed: February 28, 2005

Lower Ct: United States Court of Appeals for the Tenth Circuit

Case Nos.: (02-2048)

Decision Date: December 30, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 23 2005	Petition for a writ of certiorari filed. (Response due March 30, 2005)
Mar 25 2005	Brief of respondents Franklin Capital Corporation, et al. in opposition filed.
Apr 5 2005	Reply of petitioners Gerald T. and Juana M. Martin, et ux. filed. (Distributed)
Apr 6 2005	DISTRIBUTED for Conference of April 22, 2005.
Apr 25 2005	Petition GRANTED.
Jun 6 2005	Joint appendix filed.
Jun 6 2005	Brief of petitioners Gerald T. and Juana M. Martin filed.
Jun 29 2005	Extension of time within which to file respondents' brief on the merits to and including July 25, 2005.
Jul 20 2005	SET FOR ARGUMENT on November 8, 2005.
Jul 25 2005	Brief amicus curiae of United States filed.
Jul 25 2005	Brief of respondents Franklin Capital Corporation and Century-National Insurance Company filed.
Jul 25 2005	Brief amicus curiae of Product Liability Advisory council, Inc. filed.
Jul 29 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 3 2005	Opposition of petitioners in response to motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument.
Aug 5 2005	CIRCULATED.
Aug 24 2005	Reply of petitioners Gerald T. Martin and Juana M. Martin filed. (Distributed)
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Sep 29 2005	Record received from U.S.C.A. for Tenth Circuit. (1 envelope)
Oct 7 2005	Record received from U.S.D.C. for District of New Mexico. (1 box)
Nov 8 2005	Argued. For petitioners: Samuel H. Heldman, Washington, D.C. For respondents: Jan T. Chilton, San Francisco, Cal.

Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a removed case to state court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gerald T. and Juana M. Martin respectfully pray that a writ of certiorari issue to review the decision and judgment of the U.S. Court of Appeals for the Tenth Circuit, *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir., December 30, 2004).

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, reported at 393 F.3d 1143, is reproduced in Appendix A [1a-13a]. The order of the U.S. District Court for the District of New Mexico, which the Tenth Circuit affirmed, is reproduced in Appendix B [14a-21a].

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision below, affirming the denial of Petitioners' request for fees and expenses, was issued on December 30, 2004.

STATUTE INVOLVED

28 U.S.C. § 1447(c) provides, in pertinent part, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."

STATEMENT OF THE CASE

This is a consumer class action arising under state law, filed in New Mexico state court. Defendants removed the case to U.S. District Court for the District of New Mexico, on the basis of diversity jurisdiction. After some pretrial litigation, Plaintiffs (who are Petitioners in this Court) moved to remand for lack of jurisdiction, because the amount in controversy did not meet the statutory minimum under 28 U.S.C. § 1332. The District Court denied the motion to remand.

Plaintiffs asked the District Court to enter judgment against them so that they could seek review of the denial of their motion to remand. The District Court did so, and Plaintiffs appealed. The U.S. Court of Appeals for the Tenth Circuit held, on that appeal, that the case was not removable because the amount-in-controversy requirement for diversity jurisdiction was not met. *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001) ("*Martin I*").

The case returned to the District Court with instructions that it remand the case to state court. Plaintiffs moved, under 28 U.S.C. § 1447(c), for an award of fees and expenses. The District Court denied that motion, based on its view that the removal (though ultimately found to be contrary to law) had not been "improper" in the sense of that word that would (in that court's view) justify a fee award. [19a-20a]. As the

Tenth Circuit described it, the District Court "determin[ed] that at the time defendants removed the case to federal court, they had objectively reasonable legal grounds to believe removal was proper." [3a].

The central question as to the propriety of removal had been whether punitive damages or attorney fees could be aggregated among all class members, or attributed *in toto* to the named plaintiffs, in order to meet the amount-in-controversy requirement. Though the Tenth Circuit held that defendants' theories in that regard lacked merit, at the time of the removal there had been some short-lived (and later-reversed) out-of-Circuit authority that supported defendant's argument. Defendants had been trying, unsuccessfully, to make new law to that effect in the Tenth Circuit.

Plaintiffs appealed the denial of fees and expenses. In the decision presently under review, the Tenth Circuit affirmed the decision as having been within the District Court's discretion. *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir. 2004) ("*Martin II*").

REASONS FOR GRANTING THE PETITION

The question presented in this case is simple, but it has never received a clear answer. The question is "What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a case to state court?" For the reasons explained herein, the question needs a clear answer, and a correct one.

1. This Court has settled similar questions under other statutes.

The statute says that a District Court "may" make a fee award when remanding a case.[1] That does not, under this

[1] At stake here is a request for attorneys' fees and expenses. For brevity's sake, the Petition will sometimes simply use the word "fees," but this should not be construed as abandoning the expenses.

Court's decisions, amount to a rule of pure discretion. This Court has interpreted other fee-shifting statutes that use similarly permissive language, always recognizing that such language does not mean that each District Court can use whatever standard it thinks is best. Instead, this Court has arrived at an appropriate legal standard to govern the District Courts' decisionmaking as to each sort of case, always focusing on the language of each statute and on the policy considerations at stake in each type of litigation. A district court has discretion when it comes to applying the governing standard to the particular case; but there is, still, a governing standard.

As to civil rights statutes, for instance, this Court has adopted strong presumptions and controlling definitions, which strictly guide the District Courts' discretion. A prevailing plaintiff *should* be awarded fees absent some extraordinary reason to the contrary. *See, e.g., Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (fees should ordinarily be awarded to prevailing plaintiff "unless special circumstances would render such an award unjust"). The reason, as explained in *Piggie Park*, is that this standard furthers the statutory goal of combating civil rights violations by encouraging plaintiffs to challenge such violations.[2]

On the other hand, this Court has held, under equally permissive language, that a prevailing *defendant* in a civil rights case can be awarded fees *only* if the plaintiff's claim was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). As with *Piggie Park*, this difficult-to-meet standard for fee awards was based on this Court's understanding of what the Congress meant to encourage, and what it meant to discourage, by allowing for fee awards in such cases. The Court

[2] Though *Piggie Park* dealt with a particular civil rights statute, the same rule has since been applied to a broader range of such statutes, as well as certain statutes in other areas such as environmental law.

adopted the stringent *Christiansburg Garment* standard so as (in part) not to over-deter potential civil rights plaintiffs by the prospect of fee awards, given the Congressional desire that civil rights violations be challenged through litigation. *Id.*

Even when dealing with a different statute that (because of the relevant policy considerations) is read differently, this Court has still not interpreted permissive fee-shifting language as a grant of pure discretion. Thus, in regard to the Copyright Act, this Court has held that District Courts should apply neither the *Piggie Park* presumption in favor of an award, nor the *Christiansburg Garment* presumption against an award. But even then, the Court has not left the District Courts without guidance on the standard that they should apply; it has set out some factors that the trial courts may consider in deciding whether to award fees. *Fogerty v. Fantasy*, 510 U.S. 517, 534 n. 19 (1994) (Copyright Act).

Just as this Court has guided the lower courts in fee disputes under those other statutes, the Court should do the same with § 1447(c). As in the other cases, this Court will be guided by the relevant policy considerations that animated the enactment of the fee-shifting language. Section 1447(c)'s fee-shifting language was adopted in 1988 as part of the Judicial Improvements Act. Until that time, there had been no express authorization for a fee award upon the remand of a case to state court. In the absence of such language, courts held that fees could be awarded only if the case had been removed in "bad faith." The addition of express fee-shifting language, it is widely recognized, was designed to make fee awards available more broadly, without a showing of bad faith. *See, e.g., Tenner v. Zurek*, 168 F.3d 328, 329-30 (7th Cir. 1999); *Valdes v. Wal-Mart*, 199 F.3d 290, 292 (5th Cir. 2000); *Mints v. Educational Testing Service*, 99 F.3d 1253, 1260 (3rd Cir. 1996); *Suder v. Blue Circle*, 116 F.3d 1351, 1352 (10th Cir. 1997). A core purpose of this statutory

change, it should be uncontroversial to note, was to alleviate some of the pressure of the workload of the federal bench, by deterring inappropriate removals and by encouraging plaintiffs to oppose them. As will be seen below, the decision of the Tenth Circuit in this case, like the decisions of many other lower courts as to the governing legal standard under § 1447(c), thwarts these purposes of the fee-shifting statute.

2. The Circuits are divided into at least two camps; and the District Courts are using various standards.

There is disagreement among the lower courts as to the applicable legal standard under § 1447(c). The Circuits are split into at least two camps; and the District Courts use varying standards as well.

There is general consensus as to one initial point: that the central factor to be considered is some type of assessment of the propriety of the removal. But this is only the barest beginning to a definition of the standard; for there is a spectrum of widely differing standards that could be encompassed within that general phrasing. The spectrum would include both a *Piggie Park*-like rule that fees *should* be awarded against the unsuccessful party absent some extraordinary reason to the contrary, and a *Christiansburg Garment*-like rule that fees *should not* be awarded against the unsuccessful party unless its removal had no reasonable foundation. Each of those diametrically opposed tests could be described, in a sense, as being based on an assessment of the propriety of the removal.

This, then, is the split among the lower courts: they have adopted widely differing standards from different points on that spectrum, ranging from something at or near the *Piggie Park* standard to something quite near, and perhaps identical to, the *Christiansburg Garment* standard. Even odder, some Circuits—like the Tenth Circuit, whose decision is under review here—overtly allow each District Court to choose for

itself, on a case-by-case basis, which of those extremes (or some other middle-ground standard) to apply.

The Fifth Circuit lies at one end of the wide spectrum, the end at which fee awards are most rare. That Court's standard is that a District Court can award fees *only* if the removal, beyond being incorrect, was unreasonable. *See, e.g., Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004) ("Fees should only be awarded if the removing defendant lacked 'objectively reasonable grounds to believe the removal was legally proper.'"). Third Circuit precedent can be read as utilizing the same standard. *Roxbury Condominium Ass'n v. Anthony S. Cupo Agency*, 316 F.3d 224, 228 (3rd Cir. 2003) (holding, as an alternative ground for reversing fee award, that it was an abuse of discretion to award fees where the argument for removal was "colorable" and the relevant law was "unsettled"). This is quite close to, and indeed for practical purposes the same thing as, the *Christiansburg Garment* standard: a fee cannot be awarded against the losing party unless the party's litigation stance, beyond being incorrect, was actually unreasonable.[3]

These Circuits have thereby placed removing defendants in the same favored position, in terms of fee awards, as civil rights plaintiffs; the Circuits have protected them from fee awards unless they take a stance without reasonable basis. As will be seen below, this standard cannot be squared with the purposes, history or text of section 1447(c). It is implausible

[3] The *Christiansburg Garment* standard is "frivolous, unreasonable, or without foundation." 434 U.S. at 421. "Frivolous" and "without foundation" are, if anything, even worse than "unreasonable" in day-to-day legal parlance. To the extent that the three adjectives or phrases are not synonyms, then, "unreasonable" is ultimately the dividing line as to when fees can be awarded under *Christiansburg Garment*. That is why we say, here, that a standard that denies fees unless the removing defendant's position was unreasonable is, in essence, the *Christiansburg Garment* standard.

to suggest that the Congressional desire, in enacting § 1447(c) and thereby expanding the availability of fee awards in order to help alleviate docket crowding, was to *protect* all but the worst removing defendants.

In some other Circuits, each District Judge is free to set his or her own standard, as to how strong or weak the argument in favor of removal must have been in order to grant or deny fees. That is the effect of the Tenth Circuit's rule that a District Court *can* award fees even if the removal had a reasonable basis, but does not *have to* do so; the Circuit has left this up to each District Judge's discretion. *See Martin II*, 393 F.3d at ___, n. 3 (decision below, 6a) ("in our circuit, if defendant's removal position is objectively reasonable under the law, the district court may, in its discretion, either award attorney's fees to the plaintiff or decline to award fees. The decision is then reviewed for an abuse of discretion"); *Suder v. Blue Circle*, 116 F.3d 1351, 1352-53 (10th Cir. 1997) (district court *can* award fees even if the removal was colorable, and its decision will not be reversed unless the appellate court finds the removal actually to have been legally correct). So, it is simply up to the District Court, within its apparently unconstrained discretion, whether to use a *Piggie Park* standard, a *Christiansburg Garment* standard, or something in between. One District Judge can award fees as a matter of course upon remanding a case; the District Judge next door can decline to award fees unless the removal was plainly wrong. Also in this camp, it appears, is the Ninth Circuit. *See, e.g., Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858 (9th Cir. 2003) ("A court may award attorney fees when removal is wrong as a matter of law"); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 & n.6 (9th Cir. 2000) (discussing this discretion).[4]

[4] It is possible that the Tenth Circuit, or some others in this camp, would ultimately hold that fees *should* be awarded in a case where the removal had no reasonable basis whatsoever. But they differ from the Fifth Circuit by *allowing* a fee award even if there was a reasonable basis; yet they leave the decision in such instances entirely up to the District Court, with no particular guidance.

Other courts offer still further variations. For instance, in the Seventh Circuit a plaintiff is "presumptively" entitled to fees if a case is remanded, *e.g., Hart v. Wal-Mart Stores*, 360 F.3d 674, 678 (7th Cir. 2004). It is unclear whether that presumption can be rebutted solely by a finding that the removal, even though incorrect, had a reasonable basis. *See Sirotsky v. New York Stock Exchange*, 347 F.3d 985, 987-90 (7th Cir. 2003) (affirming denial of fees, based on assertion that the propriety of removal was debatable as well as other case-specific factors). This, then, might mean no more and no less than the Tenth Circuit's pure-discretion formulation, including the right of a District Judge to use a *Christiansburg Garment*-like standard; or it might mean something different.

Faced with unconstrained discretion, some District Courts have in effect utilized a *Piggie Park*-like standard that makes fees a normal accompaniment to a remand. *See, e.g., Gray v. New York Life Ins. Co.*, 906 F.Supp. 628, 631 (N.D. Ala. 1995) ("A significant number of district courts have since 1988 routinely awarded attorney's fees under § 1447(c)"); *Arnold v. Philip Morris* USA, ___ F.Supp.2d ___, 2004 U.S. Dist. LEXIS 15390, *14-15 (S.D. Ill. 2004) (awarding fees based squarely on Seventh Circuit's presumption in favor of such an award, making clear that this was not a sanction); *Johnson v. Port of Seattle*, 261 F.Supp.2d 1243, 1246 (W.D. Wash. 2003) (offering the following as the entirety of its reasoning in support of decision to award fees: "Because removal of this case was wrong as a matter of law, the Court will award the unnecessary litigation costs imposed on plaintiff," *citing Balcorta, supra*). Others use some other standard that is somewhere between *Piggie Park* and *Christiansburg Garment*. *See, e.g., JK&E Partnership v. Chase Manhattan Bank*, ___ F.Supp.2d ___, 2004 U.S. Dist. LEXIS 587, *15-

16 (E.D.N.Y. 2004) (using the standard of "whether the grounds for removal were substantial or presented a close question"). Others, like the District Court in this case, have decided to utilize an "unreasonableness" test like the Fifth Circuit's. So, the lower courts are spread all across the spectrum from *Piggie Park* to *Christiansburg Garment*. The confusion must not be allowed to last.

3. The correct standard would require a fee award in this case.

The correct standard for fee awards under section 1447(c), we submit, is much like the *Piggie Park* standard: that upon remanding a case, a court *should* ordinarily award fees to the plaintiff, absent special circumstances—and the existence of a reasonable (though unsuccessful) argument in favor of removal does *not* amount to such a special circumstance. Or, at least, a court remanding a case *should* award fees to the plaintiff where the removal was an unsuccessful attempt to make law expanding the boundaries of federal removal jurisdiction, and where there is no special circumstance warranting a refusal of fees. Under such a standard, Petitioners would indisputably be entitled to a fee award in this case. There was no reason for the denial of fees in this case, except for the perception that there was a reasonable argument in favor of removal at the time defendants removed the case.

The propriety of a strong presumption in favor of a fee award upon remand—and the reasons for it—are explained well in Christopher R. McFadden, *Removal, Remand and Reimbursement under 28 U.S.C. § 1447(c)*, 87 Marq. L. Rev. 123 (2003). As shown in that article, the text, history, purposes and policies of the statute all point towards a standard that would require a fee award except in unusual cases. This sort of case is much like *Piggie Park* in that regard.

Such a standard is supported by all the indications that the policy and purpose behind the 1988 enactment was to deter

inappropriate removals, to encourage plaintiffs to oppose them, and to compensate plaintiffs for them. For one thing, the statute—unlike many fee-shifting statutes—goes only in one direction. It does not allow a fee award to a defendant that successfully defends its removal; instead, it allows fees *only* to the party that opposed removal. This demonstrates that the idea was to reduce the number of removals. In addition, there is the fact that the fee-shifting language was part of a larger package of statutory changes designed (at least in large part) to restrict jurisdiction and reduce federal court workloads. *See Tank v. Chorister*, 160 F.3d 597, 599 (10th Cir. 1998) ("The purpose of the [Judicial Improvements Act of 1988] was to reduce substantially the diversity jurisdiction of the federal courts. See H.R. Rep. No. 100-889, *reprinted in* 1988 U.S.C.C.A.N. 5982."). Again, this demonstrates that the idea was to reduce the number of removals.

So, as clearly as in the civil rights context that this Court faced in *Piggie Park*, the relevant policy considerations weigh wholeheartedly in favor of the plaintiff successfully opposing removal, and thus weigh in favor of a rule that a prevailing plaintiff *should* receive a fee award absent some special or extraordinary circumstances. Just as in *Piggie Park*, or even more so, the relevant policy considerations that the Congress sought to further through the fee-shifting language are one-sided. The Congress, in enacting the fee-shifting language along with the rest of the 1988 statutory package, was working to reduce the burden on federal court dockets. Unlike the copyright statute that the Court faced in *Fogerty*, it cannot be said in this case that the Congress was equally favorably disposed towards plaintiffs and defendants; only plaintiffs (the parties who oppose removals) were made eligible for fee awards in this context. The better understanding of the 1988 enactment is that the Congress had in mind the *Piggie Park* interpretation of the word "may" in the fee-shifting context.

At the very least, a correct standard would include the principle that the existence of a reasonable (though wrong) argument in favor of removal is not, in itself, sufficient reason to deny a fee award in this case. If a defendant can escape fee liability by showing merely that it had a reasonable argument, then the statute provides only negligible deterrence—if indeed any deterrence at all—of inappropriate removals, and thus fails to achieve its purpose to any material degree. After all, when this statutory language was adopted, Fed. R. Civ. P. 11 already allowed a fee award against a defendant that removed a case without a supportable argument; so there was no need to enact a new statute to deter *frivolous* removals. *Cf. Piggie Park*, 390 U.S. at 402 n.4 (statute cannot be read as allowing fees only in case of bad faith, as courts already had the authority to issue fee awards in such cases). And it is hard to imagine the existence of any defendant who could believe that its argument in favor of removal would pass Rule 11 muster, yet would believe that its argument was unreasonable (and so would forego the opportunity to try removal, for fear of a fee award under § 1447(c)). It is virtually impossible to imagine that the Congress enacted § 1447(c)'s fee-shifting language solely for the narrow purpose of deterring that tiny hypothetical set of would-be removers who thought their potential arguments fell in that thin range between frivolous and unreasonable. In summary, if the statute means that fees can be denied on the grounds that the defendant had a reasonable argument at its disposal, the fee-shifting aspect of the statute serves practically no purpose at all.

In further support of a rule favoring a fee award in cases like this one, there is this aspect of the underlying substantive law of removal jurisdiction: that the removal statutes are strictly construed, and all doubts about the existence of removal jurisdiction are to be resolved in favor of remand. *See, e.g., Dixon v. Coburg Dairy*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism con-

cerns' implicated. Therefore, 'if federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (bracketed material in original, citations omitted). In other words, under the substantive law, defendants *should not* remove cases based on novel contentions in an attempt to expand removal jurisdiction beyond its traditional limits. An argument in favor of removal should not be made merely because it is reasonably debatable; a case should not be removed if it is doubtful whether it is removable, because any such doubts must be resolved in favor of remand. A defendant that premises removal on a legal proposition of questionable validity, in order to create new law, has ignored this fundamental rule of removal law. There is, therefore, no reason to protect such a defendant; to say that the defendant's argument was not unreasonable, is in this context to damn it with faint praise. A rule making fee awards presumptively available, when a case is remanded, would be perfectly aligned with the underlying substantive law: it would force defendants to take seriously the rule requiring strict construction of the removal statutes.

4. The question calls out for an answer; and the answer will materially affect the workload of the federal judiciary.

As discussed in *Removal, Remand and Reimbursement*, the choice of the governing legal standard for fee awards under § 1447(c) will have a material impact on the workload of the federal judiciary. *See, e.g. Removal, Remand and Reimbursement*, 87 Marq. L. Rev. at 156. Indeed, a concern for the workload of the federal judiciary was the very reason why the Congress enacted § 1447(c) in its current version, making fee awards more available than they had been under former law. The idea was to deter removal of cases that do not fall within federal jurisdiction. That deterrence is weakened, when the prospect of a fee award becomes more unlikely or even just less predictable.

Removed cases make up a significant, and growing, portion of the civil docket of the District Courts. *See* Administrative Office of the U.S. Courts, "Judicial Business of the United States Courts, 2003," Supplemental Table S-7 (available at http://www.uscourts.gov/judbus2003/contents.html) (reflecting growth of percentage of civil cases that are removals from state court, from 11.5% in 1999 to 17.5% in 2003, though having even been somewhat higher in 2002). Of removed cases, a substantial portion are remanded. *Removal, Remand and Reimbursement*, 87 Marq. L. Rev. at 124 & n.7. It is fair to suspect that even more cases than that would be remanded, if plaintiffs knew that they could obtain their fees for seeking remand. It stands to reason that many plaintiffs do not fully explore the possibility of moving for remand, and do not fully research the arguments that could obtain such a result, because the benefits of such work are often small if a fee award is unlikely.

So, the standard for fee awards, under § 1447(c), will affect the congestion of federal court dockets in at least two material ways. First, a standard calling for fee awards in more cases will deter incorrect removals in many cases (as defendants, contemplating a removal with a small chance of success, will conclude that the cost of a likely fee award outweighs the slim chance of a benefit). And second, a standard calling for more fee awards will cause more plaintiffs to challenge legally-incorrect removals—and to challenge them well—thus removing even more cases from the federal docket without the necessity of lengthy discovery, summary judgment proceedings, and trials. A standard (like the Fifth Circuit's) that calls for fewer fee awards will lead to more docket congestion, as more cases are wrongly removed and more removals go unchallenged.

Moreover, this is the sort of question that calls out for a uniform nationwide rule. The current unclear state of the law helps no one. There are, of course, many litigants and many

lawyers whose practice brings them before several Circuits and a multitude of District Judges. Those litigants and lawyers ought to be able to know, before undertaking a removal or challenging one, what law governs under § 1447(c).[5]

5. This case is an appropriate one in which to resolve the question.

This case is an appropriate one in which to decide among the various rules applied by the lower courts. However one parses the array of lower court decisions, there is this stark split: some courts deem a reasonable argument in favor of removal to be, in and of itself, a legally sufficient and appropriate reason to deny fees, and other courts do not. That split exists, as has been shown herein, even among District Courts within the same Circuit, in Circuits such as the Ninth and Tenth.

The resolution of this case should answer that precise question: whether the existence of a reasonable argument in favor of removal is a legally sufficient and appropriate reason to deny fees. If it is, then the decision below will be affirmed. If it is not, the decision below must be reversed. Upon reversal, depending on what sort of standard this Court adopts, this Court will be in position either to render a decision on the propriety of fees in this case (if, for instance, the Court adopts a *Piggie Park*-like rule) or at least to remand for further consideration in light of the newly-announced standard or set of factors.

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[5] Very recent legislation has made more class actions removable. That legislation does not moot the issue here, but rather makes the issue all the more important. Nothing in the new legislation changes the standard for fee awards under § 1447(c). Whether or not this case would hypothetically have been removable under the new standard is irrelevant to the wrongful removal as it actually occurred. Furthermore, the new statute making more cases removable will make it all the more important to deter wrongful removals, to alleviate some pressure from increasingly crowded dockets.

This case would make a better vehicle for review of this question, than would a case arising from the Fifth Circuit. Given the Fifth Circuit's *Christiansburg Garment*-like rule, a District Court in that Circuit will have had no reason to consider whether there is any reason to deny fees other than the existence of a reasonable argument in favor of removal. In this case, by contrast, the District Court's consideration was not similarly constrained; here, the District Court has had a chance to explain any reason it might deem to be a reason for denying fees, and has offered nothing other than the belief that there was a reasonable argument in favor of removal. Therefore this case brings the question that has divided the lower courts, in its purest form and in the posture that is most ready for review.

CONCLUSION

There is plainly a split in the Circuits, and an even wider divergence of law and practice in the District Courts; and the answer to the question presented will have a material impact on the congestion of federal court dockets. For the reasons stated herein, this Court should grant review of the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Dec. 30, 2004]

No. 02-2048

GERALD T. MARTIN and JUANA M. MARTIN,
individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation;
and CENTURY-NATIONAL INSURANCE COMPANY,
a California corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-1480-LH)

Before SEYMOUR and BRISCOE, *Circuit Judges*, and PAYNE*, *District Judge*.

SEYMOUR, *Circuit Judge*.

Gerald T. Martin and Juana M. Martin (Martins) sought an award of attorney's fees and expenses pursuant to 28 U.S.C. § 1447(c) from Franklin Capital Corporation and Century-National Insurance Company (defendants) after this court de-

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* The Honorable James H. Payne, Chief District Judge, United States District Court for the Eastern District of Oklahoma, sitting by designation.

termined defendants should not have removed the instant action to federal court. The district court denied the Martins' request for fees and expenses, and they appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

In September 1996, the Martins filed a lawsuit against defendants in New Mexico state court. On their behalf and on behalf of all persons similarly situated, the Martins sought damages under state statutory and common law theories for alleged illegalities with respect to automobile financing and insurance contracts they had entered into with defendants. About a month after the Martins filed their complaint, defendants removed the action to federal court based on diversity of citizenship pursuant to 28 U.S.C. §§ 1332 and 1441. The Martins raised no objection to defendants' removal at the time and did not seek remand. Over a year later, and during a hearing before the district court on defendants' motion to dismiss, the Martins first questioned whether the court possessed jurisdiction over the case. The Martins subsequently filed a motion to remand the action to state court for lack of subject matter jurisdiction on the basis that their claims did not meet the $50,000 amount in controversy requirement for diversity jurisdiction.[1]

In opposition to the Martins' motion, defendants argued variously the amount in controversy requirement was satisfied because the Martins' complaint sought punitive damages of more than $50,000 in the aggregate; sought attorney's fees of more than $50,000 in the aggregate; and sought monetary

[1] This action was filed in state court on September 13, 1996. At the time, 28 U.S.C. § 1332 required the amount in controversy to exceed $50,000. The amount in controversy requirement has since been increased to $75,000 and applies to cases filed on or after January 17, 1997. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (Oct. 19, 1996).

relief for the named plaintiffs for more than $50,000. The district court agreed with defendants and denied the Martins' motion to remand, finding "[t]he allegations of the complaint and the contents of [defendants'] notice of removal demonstrate the requisite $50,000 amount in controversy." Aplt. App. at 263.

The Martins requested the district court certify its order denying remand so they could seek interlocutory appeal under 28 U.S.C. § 1292(b), which the court denied. The Martins subsequently petitioned the court to grant judgment against them in order to permit an immediate appeal on the question of jurisdiction. The district court granted the Martins' voluntary dismissal with prejudice and they filed an appeal.

In *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001) *(Martin I)*, we reversed the district court's ruling. In the course of our analysis, we rejected defendants' argument that "the punitive damages claimed by the entire class could be aggregated and attributed to the Martins in determining the amount in controversy" for jurisdictional purposes. *Id.* at 1291. We also rejected defendants' contentions that an aggregation of attorney's fees or the amount of relief requested by the Martins as class representatives satisfied the amount in controversy requirement. *Id.* at 1291, 1293. Accordingly, we remanded with directions that the case be sent back to state court. *Id.* at 1294.

Upon returning to the district court, the Martins moved for an award of attorney's fees and expenses pursuant to § 1447 (c), which grants the district court discretion to award attorney's fees incurred as a result of removal when a case is remanded. The district court denied the Martins' request, determining that at the time defendants removed the case to federal court, they had objectively reasonable legal grounds to believe removal was proper. The Martins challenge on appeal the district court's denial of attorney's fees and expenses.

II

The language of § 1447(c) directs that the award of attorney's fees rests squarely within the discretion of the district court when a remand is ordered. *See* § 1447(c) ("An order remanding the case *may* require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." (emphasis added)). Given our decision in *Martin I* that removal was improper in this case, the district court had discretion to award attorney's fees to the Martins if it believed fees were appropriate. The district court determined defendants possessed objectively reasonable grounds to believe removal was proper and therefore declined to award fees to the Martins. We review that decision for abuse of discretion. *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 322 (10th Cir. 1997); *Daleske v. Fairfield Cmtys, Inc.*, 17 F.3d 321, 323 (10th Cir. 1994). We review *de novo* the district court's legal analysis underlying its decision. *Daleske*, 17 F.3d at 323.

In challenging the district court's ruling, the Martins assert that in a case where a defendant's removal to federal court serves as what the Martins characterize as "test litigation" regarding the existence of federal jurisdiction, and jurisdiction is subsequently found to be lacking, fees should be awarded to the plaintiff as a matter of course. They also assert the district court did not properly apply the standard articulated by our court in *Suder* and *Daleske*. Building upon their test litigation argument, they contend the district court should have adhered to what they argue is a more "plaintiff-based standard" which they say has been adopted by the Seventh and Ninth Circuits, citing *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000), and *Hofler v. Aetna US Healthcare*

of Ca., 296 F.3d 764 (9th Cir. 2002).[2] Under this approach, the Martins urge that attorney's fees should be awarded when removal is deemed improper, irrespective of whether the defendant had a legitimate or objective basis for believing in the propriety of removal. We are not persuaded.

As we have recognized:

> In deciding whether to award costs under § 1447(c), the key factor is the propriety of defendant's removal. The district court does not have to find that the state court action has been removed in bad faith as a prerequisite to awarding attorney fees and costs under § 1447(c).

Excell, Inc., 106 F.3d at 322 (internal citations omitted). On the other hand, attorney's fees may be denied where the defendant "had a fair basis for removing the case." *Daleske*, 17 F.3d at 324.

Other circuits have also recognized that the award of fees under § 1447(c) is left to the wide discretion of the district court once remand is ordered. *See, e.g., Balcorta v. Twentieth Century Fox-Film Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000) (reviewing for abuse of discretion district court's fee award determination); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000) ("The decision of the district court to award or not to award attorney's fees is reviewed for an abuse of discretion."); *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996) ("a district court has broad discretion and may be flexible in determining whether to require the payment of fees under section 1447(c)"); *Morris v. Bridgestone/*

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[2] In this context, we note that the Martins' citation to and reliance on *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000), is misplaced. The controversy in *Hotline* did not involve entitlement to fees but focused instead on the appropriate amount of fees awarded. *Id.* at 366-68. *But see Sirotzky v. New York Stock Exch.*, 347 F.3d 985, 987 (7th Cir. 2003) ("provided removal was improper, the plaintiff is *presumptively* entitled to an award of fees").

Firestone, Inc., 985 F.2d 238, 240 (6th Cir. 1993) (agreeing that "the . . . statute affords a great deal of discretion in fashioning awards of costs and fees") (quotation omitted)); *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 971 F.2d 917, 924 (2d Cir. 1992) (statute provides district courts with discretion in how to award costs and fees). While the Seventh Circuit has suggested there is a presumption that fees be awarded to plaintiffs under § 1447(c) upon a finding of improper removal, *see e.g., Sirotzky v. New York Stock Exch.*, 347 F.3d 985, 987 (7th Cir. 2003), "[n]evertheless, the entitlement is not automatic—the presumption is not irrebuttable. . . ." *Id.*[3]

Between these varied expressions regarding § 1447(c), there remains the broadly accepted position that if a defendant's removal could be fairly supported by the law at the time, even if later deemed incorrect, a district court's discretionary decision not to award fees is appropriate. Indeed, most courts do not impose fees when the defendant had a legitimate ground for seeking removal. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107. 41[3][a][ii] (3d ed. 1997); *see also* 14C CHARLES ALAN

[3]Contrary to the Martins' assertion, we are not convinced the Ninth Circuit follows a similar approach. In *Balcorta v. Twentieth Century Fox-Film Corp.*, 208 F.3d 1102 (9th Cir. 2000), the court made clear that "it may be within the discretion of the district court not to award fees" when a defendant's attempt to remove the action had a sufficient basis in the law, and also that the circuit's "case law does permit an award of fees when a defendant's removal, while 'fairly supportable,' was wrong as a matter of law." *Id.* at 1106 n.6; *see also Hofler v. Aetna US Healthcare of Ca.*, 296 F.3d 764, 770 (9th Cir. 2002) ("fees are proper when removal is wrong as a matter of law, even though the defendant's position may be 'fairly supportable'"). In other words, in the Ninth Circuit, as in our circuit, if defendant's removal position is objectively reasonable under the law, the district court may, in its discretion, either award attorney's fees to the plaintiff or decline to award fees. The decision is then reviewed for an abuse of discretion.

WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3739 (3d ed. 1998) (noting award of fees is at discretion of district court, and fees may be denied "when there are reasons to believe that the removability of the case was plausible").

The Martins incorrectly claim the district court employed a standard other than that required by our circuit. In accordance with *Suder* and *Daleske*, the district court recognized that a plaintiff is not automatically entitled to attorney's fees simply because removal was ultimately determined to be improper. Instead, relying on *Valdes*, 199 F.3d at 292, it determined it should "evaluate the merits of Defendants' removal action at the time it was filed." Aplt. App. at 344; *see also Valdes*, 199 F.3d at 293 ("the question we consider in applying § 1447(c) is whether the defendant had objectively reasonable grounds to believe the removal was legally proper"). This characterization accords with our decision in *Daleske*, in which we upheld a denial of fees where the defendant "had a fair basis for removing the case." 17 F.3d at 324. Upon determining that defendants' removal position was objectively reasonable at the time they sought removal, the court exercised its discretion and declined to award fees to the Martins. As we discuss in more depth below, we find no fault in the district court's articulation or implementation of the fee award standard.

III

Having determined the district court employed the proper standard in deciding whether to award fees to the Martins, we now examine whether the court correctly concluded that when defendants removed the underlying action in October 1996, they had a legitimate basis to believe the federal court could exercise jurisdiction over the case. *Valdes*, 199 F.3d at 293; *Daleske*, 17 F.3d at 325. While a close question, we agree with the district court that at the time defendants removed this action to federal court on the basis of aggregating punitive damages, they "had objectively reasonable

grounds to believe the removal was legally proper."[4] Aplt. App. at 347.

In support of their motion to remove to federal court, defendants contended that "punitive damage claims in a class action suit may be considered in the aggregate when determining the amount in controversy." *Id.* at 3. In making this argument, defendants relied on case law from the Fifth and Eleventh Circuits, which at the time indicated that aggregation of punitive damages in a class action suit was permissible to reach the amount in controversy requirement for diversity jurisdiction. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996); *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). Although these cases were subsequently severely limited and overruled by their respective circuits, *see H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000); *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 601-02 (5th Cir. 1998), *Tapscott* and *Allen* represented viable authority in October 1996 upon which defendants could rely to support their petition for removal.

As noted above, in *Martin I* we rejected defendants' argument regarding aggregating punitive damages. We commented on the demise of *Tapscott* and *Allen*, and we noted that "all of the circuits considering the issue *now* hold that punitive damages cannot be aggregated and attributed in total to each member of a putative class for purposes of satisfying the amount-in-controversy requirement of diversity jurisdiction." *Martin I*, 251 F.3d at 1292 (emphasis added) (citing *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1264-65

[4] Because we agree with the district court's conclusion that defendants' removal to federal court on an aggregation of punitive damages theory was objectively reasonable, as well as with the court's subsequent refusal to award fees to the Martins on the basis of that argument, we need not address defendants' remaining positions supporting removal.

(11th Cir. 2000); *Ard*, 138 F.3d at 600-02; *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997); *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996)). Based on this precedent, we joined these other circuits in concluding that the amount in controversy requirement in a class action suit may not be satisfied by aggregating punitive damages. *Id.* at 1293.

On remand, the district court emphasized that we relied primarily on case law post-dating defendants' October 1996 removal to federal court in reversing the district court's earlier ruling. Likewise, the court pointed out that the Fifth and Eleventh Circuit rulings undermining *Allen* and *Tapscott* were decided several years after the removal action in this case. Finally, the court took special notice of our comment that we had not previously "ruled directly on [the] matter" of aggregating punitive damages. Aplt. App. 345 (quoting *Martin I*, 251 F.3d at 1292). The district court stated accordingly that

> [b]ased on the language contained in this Tenth Circuit, and given the history of the law in this area, I am unable to conclude that the removal was improper *ab initio* . . . . It appears that the Tenth Circuit remanded [this case] largely based on changes in the law during the time between the removal (1996), and its opinion (2001).

Id. at 345-46. The district court did not err in this ruling.

We acknowledge that in October 1996, several district courts, including some in our own circuit, had rejected the approach adopted in *Tapscott* and *Allen*. *See, e.g., Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 222-23 (S.D.N.Y. 1996); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 297-99, 301-02 (D.N.J. 1996); *Asten v. Southwestern Bell Tel. Co.*, 914 F. Supp. 430, 433-34 (D. Kan. 1996); *Visintine v. Saab Auto. A.B.*, 891 F. Supp. 496, 498-99 (E.D. Mo. 1995); *Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537, 541-42 (D.

Colo. 1993). Moreover, the courts in both *Tapscott* and *Allen* sidestepped circuit precedent which, according to *H&D Tire* and *Cohen*, should have guided them to conclude it was not permissible to aggregate punitive damages in a class action suit to establish diversity jurisdiction. *See H&D Tire*, 227 F.3d at 330; *Cohen*, 204 F.3d at 1076. In *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978), a class action, the court had held that claims of individual class members "cannot be aggregated for the purpose of satisfying this jurisdictional predicate." *Id.* at 594. While the court did not specifically discuss the punitive damages claim of one million dollars, it reversed the removal decision because the complaint failed to allege the number of class members, an unnecessary result if punitive damages could be aggregated.[5] *Id.* at 595.

Oddly enough, *Lindsey* was cited in both *Tapscott* and *Allen*, although neither decision devoted much discussion to it. *See Tapscott*, 77 F.3d at 1357 n.9 (referencing *Lindsey* for general proposition that "each putative class member must satisfy" jurisdictional requirements); *Allen*, 63 F.3d at 1332 n.9 (noting disagreement among district courts in Fifth Circuit on whether joint claims of punitive damages constituted common and undivided interests allowing for aggregation). When the Fifth and Eleventh Circuits revisited the *Allen* and *Tapscott* decisions, both circuit courts referred to the pre-existing and conflicting precedent of *Lindsey* and determined it controlled the question of whether punitive damages could

[5] *Lindsey v. Alabama Tel. Co.*, 576 F.3d 593 (5th Cir. 1978), was decided before the Fifth Circuit was divided into two circuits on October 1, 1981, resulting in the creation of the Eleventh Circuit. The Eleventh Circuit subsequently held that decisions handed down by the Fifth Circuit prior to September 30, 1981, would be binding precedent in the Eleventh Circuit. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). Therefore, *Lindsey* serves as binding precedent for both the Fifth and Eleventh Circuits.

be aggregated. *See H&D Tire*, 227 F.3d at 330; *Cohen*, 204 F.3d at 1076. Nevertheless, that the courts in both *Tapscott* and *Allen* cited *Lindsey* gives weight to the argument that the answer to whether punitive damages could be aggregated in the Fifth and Eleventh Circuits was in flux. While *Lindsey*'s precedent ultimately prevailed, the *Tapscott* and *Allen* courts' seeming rejection of *Lindsey*'s punitive damages analysis created a legitimate basis on which defendants could rely to support their aggregation argument.

In challenging defendants' contentions that there existed legitimate grounds to believe punitive damages could be aggregated in order to satisfy the amount in controversy requirement, the Martins assert the Supreme Court in *Snyder v. Harris*, 394 U.S. 332 (1969), and this circuit in *Justice v. Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503 (10th Cir. 1991), made clear that any argument regarding the aggregation of punitive damages in a class action case would be rejected outright. We disagree. In *Snyder*, the Supreme Court reiterated the general rule "that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." 394 U.S. at 335. But the Court noted an exception to this non-aggregation rule, stating in part that aggregation would be permitted "in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* Hence, under *Snyder*, there was room to argue that the nature of a punitive damage claim in a class action suit was common and undivided, therefore possibly permitting aggregation.

The courts in *Tapscott* and *Allen* tested the *Snyder* exception and held that punitive damage claims could be deemed common and undivided based on the characterization of punitive damages in the two states in those respective cases. Therefore they could be aggregated for the purposes of meeting the amount in controversy requirement. *Tapscott*,

77 F.3d at 1357-59; *Allen*, 63 F.3d at 1334-35. So holding, the courts reached a supportable conclusion that the aggregation of punitive damages was permitted under the *Snyder* exception.

In *Justice*, our court acknowledged *Snyder*'s general rule barring aggregating claims of multiple plaintiffs where those claims are separate and distinct, rather than common and undivided. 927 F.2d at 504. However, we did not devote any further discussion to whether the aggregation of common claims was permitted. Rather, we focused on "whether state law or federal common law determines if the claims are separate and independent." *Id.* We noted that

> federal law is used to determine whether the claims are separate and independent, and state law determines the nature of the claims to which the federal law test is applied. In other words, state law determines the character of plaintiff's claim, and federal law determines whether that claim meets the standard of Section 1441(c).

Id. (internal citation omitted).[6] We then examined the nature

[6]*See also* 14C CHARLES ALAN WRIGHT ET AL. FEDERAL PRACTICE AND PROCEDURE § 3724 (3d ed. 1998). The Martins vigorously assert that because we had previously recognized in *Justice* that federal law determines whether claims are separate and independent, defendants' reliance on *Tapscott* and *Allen* was unwarranted. However, as we also recognized in *Justice*, state law often plays a role in determining whether a case can be removed. Professor Wright begins his discussion by stating *"[b]oth* federal and state law play a part in determining the removability of a case under Section 1441(c)," noting that "state law determines the substantive character of the plaintiff's claim." *Id.* For example, "state law is relevant to the question of whether an alleged liability is joint and federal law controls whether a case concerning joint liability is removable." *Id.* (emphasis added); *see also, e.g., Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1280-81 (11th Cir. 2001) (referring to state law to determine nature of punitive damages and then holding state characterization does not allow for aggregation); *Spriggs v. Wolf*, 496 F. Supp. 990, 991 (W.D. Okla. 1979) (court looked to Oklahoma law to determine if garnishment proceeding was separate from other claims asserted in action); *Anderson v. Union Pac. R.R. Co.*, 200 F. Supp. 465, 467 (D. Kan. 1962) (local law determines whether claim is joint or several in character).

of the plaintiffs' claims, determined they were in fact separate and independent, and held they satisfied the amount in controversy requirement without aggregation. *Id.* at 504-05. Contrary to the Martins' assertions, neither *Snyder* nor *Justice* directly addressed the specific question of whether a punitive damage claim in a class action suit may be aggregated for jurisdictional purposes.

In sum, in October 1996, when defendants in the instant case removed this action to federal court, they possessed legitimate grounds upon which to believe punitive damage claims could be aggregated in a class action suit in order to satisfy the amount in controversy requirement. We consequently agree with the district court that based on the law existing at that time, defendants possessed "objectively reasonable grounds to believe the removal was legally proper." Aplt. App. at 347. Given the uncertain state of the law on aggregation of punitive damages when defendants removed this action, we cannot say the district court abused its discretion in declining to award fees to the Martins.

We AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV. 96-1480 LH/RLP

GERALD T. MARTIN and JUANA M. MARTIN,
Individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation,
and CENTURY-NATIONAL INSURANCE COMPANY,
a California Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for an Award of Attorney's Fees and Expenses Under 28 U.S.C. § 1447 (Docket No. 68). Specifically, Plaintiffs seek approximately $60,000 in fees and expenses, allegedly necessitated by Defendants' improper removal. The Court, having read the pleadings of both parties and being fully advised in the premises, finds that Plaintiffs' motion shall be denied.

Factual Background

This lawsuit was originally filed in state court on September 13, 1996. On October 26 1996, on grounds of diversity of citizenship jurisdiction, Defendant Century-National Insurance Company ("Century") removed this case to federal court with the consent of Franklin Capital Corporation ("Franklin") (hereinafter jointly referred to as "Defendants"). It was not until November 25, 1997 that Martins first raised the issue of this Court's jurisdiction. On February 3, 1998, the Martins

filed a motion to remand to state court for lack of subject matter jurisdiction, on the basis that their claims did not meet the $50,000 amount-in-controversy requirement for diversity jurisdiction.[1] On May 21, 1998, an order was entered denying that motion. On March 30, 1999, at the Martin's request judgment was entered against them, after their request for an interlocutory appeal was denied on November 6, 1998.

A notice of appeal was filed on April 27, 1999. The Tenth Circuit entered its opinion more than two years later, on May 29, 2001. *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001). That opinion reversed this Count, concluding that this Court lacked subject matter jurisdiction, and remanded the case, with directions to remand this action to state court. The Tenth Circuit concluded that Defendants had failed to affirmatively establish the requisite jurisdictional amount, on the face of the petition or in the removal notice. That Court specifically rejected Defendants' contention, as contained in both the removal notice and on appeal, that jurisdiction was satisfied because the attorneys fees and the punitive damages claimed by the entire class could be aggregated and attributed to the Martins for purposes of determining the amount in controversy, and that so long as the Martins, as class representatives, met the jurisdictional amount, the other class members fell within the court's supplemental jurisdiction regardless of the value of their claims.

The Martins argue that, although Defendants' notice of removal did not rise to the level of bad faith or frivolousness, that their legal theories in support of removal were against the vast weight of legal authorities and were not well taken by the Tenth Circuit under "well established legal precepts that were well known to Defendants at all material times." (Ptfs' Mem. at 2). This is the basis for their fee request.

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[1] At the time this action was filed in state court (September 13, 1996). 28 U.S.C. § 1332 required the amount its controversy to exceed $50,000.

Applicable Standards

As amended in 1988, 28 U.S.C. § 1447(c) provides in pertinent part that an order remanding the case may require payment of just costs and actual expenses, including attorneys fees, incurred as a result of the removal. *See Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 324 (10th Cir. 1994), *cert. denied*, 511 U.S. 1082 (1994) (noting amendment deleted requirement that case be removed improvidently and authorized award of attorneys fees). Such an award is discretionary with the Court, and bad faith need not be shown. *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997) (*citing Daleske*, 17 F.3d at 324-25). The "propriety of defendant's removal continues to be central in determining whether to impose fees." *Deleske*, 17 F.3d at 324 (*quotation omitted*). The Tenth Circuit is one of the circuits that requires a showing that the removal was improper *ab initio*.[2] *Suder*, 116 F.3d at 1352; *Daleske* 17 F.3d at 324. Subsequent to *Daleske*, the *Suder* court pointed out that this standard is much different than colorable. "A removal is proper only if it is legitimate." *Suder*, 116 F.3d at 1352.

According to these standards, I must determine whether removal was improper *i.e.*, illegitimate, at the beginning, or in the first place, which I construe as the time that the notice of removal was filed, *i.e.*, on October 26, 1996. I must objectively evaluate the merits of Defendants' removal action at the time it was filed. *See Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000). As noted above, the legal theory underlying this removal was that the attorneys fees and punitive damages claimed by the entire class could be aggregated and attributed to the Martins in determining the amount in controversy. Further, Defendants maintained that so long as the Martins, as class representatives, met the jurisdictional

[2] This means "from the beginning." BLACK'S LAW DICTIONARY 6 (6th Ed. 1990).

amount, the other class members fell within the court's supplemental jurisdiction regardless of the value of their claims.

Aggregation of Punitive Damages

It is important to bear in mind that the notice of removal was filed in October of 1996. In holding, apparently for the first time, that punitive damages may *not* ordinarily be aggregated and attributed in total to each member of a putative class for purposes of satisfying diversity jurisdiction, the Tenth Circuit relied on language of the 1998 *Leonhardt* case,[3] as well as on other post-1996 case law from other circuits. The Tenth Circuit relied especially on the reasoning of Second Circuit case of *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997). *See Martin*, 251 F.3d at 1292.

In its opinion, the Tenth Circuit noted that two cases upon which Defendants had relied had been disapproved by the circuits that decided them.[4] *Id.* The circuit opinions disapproving and limiting Defendants' relied upon case law were filed in 2000 in the Eleventh Circuit and in 1998 at the Fifth Circuit.

> At least one commentator has summarized the history of this development of law in this area:
>
> There *currently* is agreement that punitive damages claims are not by nature common and undivided, making aggregation possible only if putative class members are suing to enforce a single title or right in which they have a common and undivided interest.

[3] *Leonhardt v.Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998).

[4] These two cases are *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), and *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) disavowed *Tapscott*, and *Allen* was disavowed by *Ard v. Transcont'l Pipe Line Corp.*, 138 F.3d 596, 601-02 (5th Cir. 1998). *See also H&D Tire and Auto Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) (holding that *Allen* is not valid precedent).

Several years ago, the Fifth and Eleventh Circuits suggested that punitive damages claims ordinarily may be aggregated. *See Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), 96 Fed Lit 139; *Allen v. R&H Oil Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). They have since explained that aggregation is not the rule. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *Ard v. Transcontinental Pipe Line Corp.*, 138 F.3d 596 (5th Cir. 1998).

In addition to the Ninth Circuits,[5] the Second, Seventh, Eighth and Tenth Circuits reject aggregation as the usual rule. *See Crawford v. R. Hoffman-LaRoche Ltd.*, 2001 WL 1160354 (8th Cir. 2001); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *In re Brand Names Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997); *Gilman v BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997), 97 Fed Lit 98. Only if putative class members are suing to enforce a single title or right in which they have a common interest is aggregation possible

16 NO. 11 FED. LITIGATOR 270 (2001) (emphasis added).

I have carefully reviewed the pertinent caselaw and agree with this summary of it.

The Tenth Circuit noted in its opinion that it had "not ruled directly on this matter". *Martin*, 251 F.3d at 1292. Further, it indicated that it would "*now hold*, in light of the language in *Leonhardt* and the analysis of our sister circuits, that punitive damages may not ordinarily be aggregated and attributed in total to each member of a putative class for purposes of satisfying diversity jurisdiction." *Martin*, 251 F.3d at 1292 (emphasis added).

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[5] Here this article is making reference to the case of *In re Ford Motor Company/Citibank (South Dakota), N.A. v. Ford Motor Company*, 264 F.3d 952 (9th Cir. 2001).

Based on the language contained in this Tenth Circuit, and given the history of the law in this area, I am unable to conclude that the removal was improper *ab initio*. As noted by the Tenth Circuit, as grounds for removal, Defendants relied on the two cases of *Tapscott* and *Allen*, which were not abrogated until the years 2000 and 1998 respectively. Obviously this Court did not consider the removal improper at that time, given its refusal to remand the case to state court. Although the removal was subsequently remanded by the Tenth Circuit, I conclude that, at the time of the removal, it was not improper. It appears that the Tenth Circuit remanded largely based on changes in the law during the time between the removal (1996), and its opinion (2001).

Aggregation of Attorney Fees -

In analyzing the aggregation of attorney fees issue, the Tenth Circuit noted that courts "have generally held, under the same rationale applied to preclude the aggregation of punitive damages, that attorneys fees cannot be aggregated for purposes of diversity jurisdiction." *Martin*, 251 F.3d at 1293. Once again the Tenth Circuit relied primarily upon post-1996 case law for its conclusion that attorney fees cannot be aggregated.[6] The Tenth Circuit's acknowledgment that courts had applied the same rationale to the aggregation of attorney fees as has been applied to the aggregation of punitive damages, compels application of the same rationale to my analysis. As above, I must conclude that Defendants' removal on this basis was not improper *ab initio*.

Conclusion

I am fully cognizant of the fact that, in its May 2001 decision, the Tenth Circuit held that this matter was improp-

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[6] This case *Morrison v. Allstate Indem. Co.* 228 F.3d 1255, 1264-65 (10th Cir. 2000). The *Martin* opinion did also mention a 1982 Ninth Circuit case, *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982).

erly removed to federal court, and ordered remand of the case to state court. The fact that, more than four years later, removal was determined to be improper does not automatically entitle the plaintiff to attorney fees however. *See Hale v. Masstersoft International Pty. Ltd.*, 93 F. Supp.2d 1108, 1114 (D.Colo. 2000), *citing Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000).[7] Rather, the court must objectively evaluate the merits of the Defendants' removal action at the time it was filed. *Id.* at 292-93.

As noted in *Moore's Federal Practice*, "as a practical matter, most courts refuse to award the plaintiff costs and fees when the defendant had a legitimate or colorable legal ground for removal . . ." 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.41[3][A](3d ed. 1997). *See Daleske*, 17 F.3d at 325 (declining to award fees on conclusion that defendant had legitimate basis for believing district court had jurisdiction). Here, for the reasons above stated, I conclude than in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area, as discussed above. Although the Tenth Circuit has now declared that Defendants' underlying reasons for removal are improper, that conclusion does not require this Court to award attorney's fees to Plaintiffs. Under the circumstances set forth in this decision, I conclude that it is not appropriate to award fees and that Plaintiffs' motion will be dated.

[7] *Valdes* stated: "We evaluate the objective merits of removal at the time of removal, irrespective of the fact that is might ultimately be determined that the removal was improper." *Valdes*, 199 F.3d at 293.

WHEREFORE for the reasons stated herein. Plaintiffs' Motion for an Award of Attorney's Fees and Expenses Under 28 U.S.C. § 1447 (Docket No. 68) is denied.

IT IS SO ORDERED.

/s/ _____
U.S. District Court Judge

Supreme Court, U.S.
FILED
MAR 25 2005
OFFICE OF THE CLERK

No. 04-1140

In The Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

Did the district court abuse its discretion in denying plaintiffs an award of attorney fees under 28 U.S.C. § 1447(c) when:

(a) The lower courts found that, at the time of removal, defendants had objectively reasonable grounds, based on novel or unsettled law, for believing removal to be legally proper,

(b) Plaintiffs conceded that, at the time of removal, they also believed the removal was legally proper,

(c) Plaintiffs did not move to remand for more than a year after removal and only when the district court indicated it would likely rule against them on other pending motions, and

(d) The district court denied the remand motion, but was reversed on appeal based on post-removal appellate clarifications previously unsettled law?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to this case.

CORPORATE DISCLOSURE STATEMENT

Franklin Capital Corporation is an automobile finance company. Franklin Resources, Inc., a publicly held corporation, owns more than 10% of Franklin Capital Corporation's stock.

Century-National Insurance Company is an insurance company which is wholly owned by Kramer-Wilson Company, a privately owned insurance holding company. No parent or publicly held corporation owns 10% or more of Century-National's stock.

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BRIEF IN OPPOSITION

Respondents Franklin Capital Corporation and Century-National Insurance Company respectfully submit that plaintiffs' petition for a writ of certiorari should be denied for the reasons stated below.

STATEMENT OF THE CASE

In 1996 plaintiffs filed this class action in New Mexico state court, alleging they had been overcharged for collateral protection insurance after they failed to maintain their own insurance on the cars they had purchased on credit. Among other relief, plaintiffs sought to void the credit sale contracts for their cars and to recover actual and treble damages, punitive damages, and attorney fees.

Defendants timely removed the case to district court based on diversity jurisdiction. Plaintiffs are New Mexico citizens. Defendants are citizens of other states. Upon removal, Century-National filed a motion to dismiss.

Plaintiffs did not file a remand motion. They opposed the motion to dismiss and proceeded with discovery in district court. A year after removal, they moved for class certification.

More than a year after removal, plaintiffs first raised a "concern" abou urisdiction at oral argument on the motion to dismiss a ter the district court indicated it might grant the motion. Explaining his delay in raising the issue, plaintiffs' counsel said:

> [A]t the time of removal, we interpreted the removal to be [made on the ground that] the plaintiffs arguably had a claim over [$]50,000. Of

course, there was no evidence that each class member had a claim of over [$]50,000. But as this Court knows, the Seven[th] Circuit, in [*Stromberg*], which is at 77 F.3d 721, and earlier the Fifth Circuit in *Abbott* at 51 F.3d 524, both found that the [*Zahn*] case,[1] which said you could not [aggregate], had been overruled by Congress. And so based on the removal at that time, we decided not to contest jurisdiction.

However, last month Franklin put in an affidavit . . . stat[ing] that the [plaintiffs] had made no payments for the [collateral protection] insurance.

[I]n light of the fact that the only basis we know to support jurisdiction which we were willing to accept indicated that there was jurisdiction until this affidavit was submitted to us on October 21, we were willing to accept that.

The district court reserved its ruling on the motion to dismiss and invited plaintiffs to file a motion attacking jurisdiction. Sixteen months after removal, plaintiffs filed such a motion, attacking only the amount in controversy.

Defendants filed opposition contending the amount in controversy requirement was satisfied in three independent ways: (1) the named plaintiffs individually sought relief worth more than $50,000, and the district court could exercise supplemental jurisdiction over class members' claims pursuant to 28 U.S.C. § 1367 even if they

[1] The three cited cases are *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir. 1996); *In re Abbott Laboratories*, 51 F.3d 524, 527-29 (5th Cir. 1995), *aff'd by equally divided court, sub nom., Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000); and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

claimed less than $50,000; (2) the class' punitive damages claims could be aggregated and exceeded $50,000; and (3) the class' claim for attorney fees could be aggregated and exceeded $50,000.

The district court denied plaintiffs' attack on its jurisdiction, finding that plaintiffs individually stated colorable claims for an amount which was not certainly less than $50,000. The district court denied plaintiffs' later request that it certify that ruling for interlocutory appeal under 28 U.S.C. § 1292(b), stating: "[m]y exercise of subject matter jurisdiction on the remand issue was properly based upon these considerations of the [complaint's] allegations as of the time of removal. I conclude there is no substantial ground for difference of opinion on this issue."

The district court also denied plaintiffs' class certification motion and granted Century-National's motion to dismiss. At plaintiffs' request, the district court entered judgment dismissing the complaint with prejudice so plaintiffs could immediately appeal the jurisdictional issue.

The Court of Appeals held that defendants had not proven by a preponderance of the evidence, based solely on the complaint and notice of removal, that plaintiffs individually sought more than $50,000.[2] *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290-91 (10th Cir. 2001). It also ruled, as a matter of first impression in that circuit,

[2] The Court of Appeals also pointed out that *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 638-41 (10th Cir. 1998) – issued after judgment was entered in this case – held that 28 U.S.C. § 1367 did not overrule prior authority requiring that each class member individually meet the amount in controversy requirement. *Martin*, 251 F.3d at 1294.

that neither punitive damages nor attorney fees could be aggregated in a class action to reach the amount in controversy. *Id.*, at 1292-93. The Court of Appeals reversed the judgment and remanded the case to the district court, directing that it remand the case to state court.

Plaintiffs then moved for an award of attorney fees and expenses under 28 U.S.C. § 1447(c). The district court denied the motion. It noted that it had discretion to award fees even though no bad faith was shown. Pet. 16a. It should award fees, it said, if it found that the removal was not proper or legitimate – a standard "much different than colorable" – under legal authority extant at the time of removal. *Id.* Aggregation of punitive damages and attorneys fees, the district court concluded, were theories supported by legal authority at the time of removal; hence, the removal was proper. Pet. 17a-19a. Summing up, the district court said:

> . . . I conclude that in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area. . . . . . Under the circumstances set forth in this decision, I conclude that it is not appropriate to award fees. . . .

Pet. 20a.

Plaintiffs appealed denial of the fee motion, and the Court of Appeals affirmed. It held that the district court had applied the appropriate legal standard in deciding the motion. Pet. 4a-7a. It also agreed with the district court "that at the time defendants removed this action to federal

court on the basis of aggregating punitive damages, they 'had objectively reasonable grounds to believe the removal was legally proper.'" Pet. 7a-8a. "Given the uncertain state of the law on aggregation of punitive damages," said the Court of Appeals, "we cannot say the district court abused its discretion in declining to award fees to [plaintiffs]." Pet. 13a.

REASONS FOR DENYING THE WRIT

Plaintiffs' petition for certiorari should be denied. There is no real conflict among the Courts of Appeals as to the legal standard a district court is to apply in exercising its discretion to award fees under 28 U.S.C. § 1447(c). Any divergence between Court of Appeal decisions on the issue lies solely in the verbal formulas used, not in the substantive results reached.

No court has endorsed plaintiffs' proposal that fees be awarded on remand "absent some special or extraordinary circumstances" or when removal is sought on a novel or untested theory. Pet. 11-13. Quite to the contrary, lower courts agree that fees should *not* be awarded if the law governing removability in a particular case is complex and unsettled, as the lower courts found it was in this case.

The issue for review is not important enough to justify review. In few cases will a fee award turn on precisely where in the spectrum the legal cutoff for a fee award is placed. So long as they retain the substantial discretion Congress intended, district courts are likely to reach the same results no matter what legal standard is stated. A more liberal allowance of fees is unlikely to lower the volume of federal court business appreciably.

I. There Is No Conflict Among The Courts Of Appeals Regarding The Legal Standard For Fee Awards Under 28 U.S.C. § 1447(c)

There is no real, let alone intolerable, conflict among Court of Appeals decisions sufficient to warrant this Court's review of the legal standard for fee awards under 28 U.S.C. § 1447(c). In fact, "[u]se of this fee-shifting power has been non-controversial."[3]

The Courts of Appeals agree that fee awards under § 1447(c) are governed by a relatively simple set of rules: Fees may *not* be awarded when the removal was legally proper, even if the district court mistakenly remanded the case.[4] But if the case was properly remanded, fees may be awarded without any showing that the removing defendant acted in bad faith or with improper motives.[5] In between those extremes, the district courts exercise broad

[3] *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 927 (7th Cir. 2000), citing *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992); *Mints v. Educational Testing Serv.*, 99 F.3d 1253 (3d Cir. 1996); *Avitts v. Amoco Prod. Co.*, 111 F.3d 30 (5th Cir. 1997); *Stallworth v. Greater Cleveland RTA*, 105 F.3d 252 (6th Cir. 1997).

[4] *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 545-46 (5th Cir. 2004); *Roxbury Condominium Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 228 (3d Cir. 2003); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000) ("[W]e will overturn the award if it is based on an erroneous determination of law – that is, if the district court wrongly determined that the case should be remanded to state court.").

[5] *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000); *Balcorta*, 208 F.3d at 1105-06 n. 6 (9th Cir.); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000); *Mints*, 99 F.3d at 1260 (3d Cir.); *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 323 (10th Cir. 1994); *Morris v. Bridgestone/Firestone, Inc.*, 985 F.3d 238, 240 (6th Cir. 1993); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 448 (9th Cir. 1992); *Morgan Guar. Trust Co.*, 971 F.2d at 923 (2d Cir.).

discretion, and their decisions, reviewed for abuse of discretion, are upheld on appeal with only rare exceptions.[6]

Exercise of that discretion turns mainly on "the nature of the defect in the attempted removal and where the defendant's erroneous action seems to fall on a spectrum running from reasonable to frivolous.[7] The district court will be inclined to order the payment of costs under Section 1447(c) when the non-removability of the action should have been obvious. . . ."[8] Conversely, costs and fees will be denied by the district court when there are reasons

[6] *Hornbuckle*, 385 F.3d at 541 (5th Cir.) (abuse of discretion standard); *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir. 2003) (same); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997) (same); *Mints*, 99 F.3d at 1260 (3d Cir.) (same); *Moore*, 981 F.3d at 447 (9th Cir.) (same).

[7] *Hornbuckle*, 385 F.3d at 541 (5th Cir.) (We "consider the objective validity of the removing party's efforts, at the time that party attempted to remove the case."); *Valdes*, 199 F.3d at 293 (5th Cir.); *Daleski*, 17 F.3d at 324 (10th Cir.) ("propriety of the defendant's removal continues to be central"); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (same).

[8] *Hart v. Wal-Mart Stores, Inc. Associates' Health & Welfare Plan*, 360 F.3d 674, 679-81 (7th Cir. 2004) (two prior Seventh Circuit cases rejected theory); *Hofler v. Aetna US Healthcare of Cal., Inc.*, 296 F.3d 764, 770 (9th Cir. 2002) (numerous courts had rejected similar removal theory; district court has discretion to award fees even if removal theory is "colorable" or "fairly supportable"); *Ansley*, 340 F.3d at 865 (9th Cir.) (defendant had no authority to support complete preemption argument); *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587-88 (5th Cir. 2001) (prior Fifth Circuit cases rejected removal theory); *Suder*, 116 F.3d at 1352-53 (10th Cir.) (test is "propriety" of removal, not whether defendant merely had "colorable" basis); *Mints*, 99 F.3d at 1261 (3d Cir.) (removal petition at best insubstantial).

to believe that the removability of the case was plausible.[9][10]

Other factors may also affect the decision to award fees. Fees may be denied if the plaintiff is partly responsible for the removal, for the case's remaining in federal court, or for altering the case after removal to precipitate a remand.[11] On the other hand, fees may be awarded if the defendant failed to notify the court of developments depriving it of jurisdiction[12] or engaged in other inequitable or improper conduct.[13] Several circuits, therefore, employ a test of "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties."[14]

The Seventh Circuit has suggested that if "removal was improper, the plaintiff is *presumptively* entitled to an

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[9] *Martin v. Franklin Capital Corp.*, 393 F.3d 1143, 1148-51 (10th Cir. 2004); *Roxbury Condominium Ass'n, Inc.*, 316 F.3d at 228 (3d Cir.); *Valdes*, 199 F.3d at 293-94 (10th Cir.); *In re Lowe*, 102 F.3d 731, 733 n. 2 (4th Cir. 1996); *Virgin Islands Housing Auth. v. Coastal Gen. Constr. Serv. Corp.*, 27 F.3d 911, 917 (3d Cir. 1994).

[10] 14C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3739 (3d ed. 2004) (fns. omitted).

[11] *Avitts*, 111 F.3d at 32-33 (5th Cir.); *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490-91 (9th Cir. 1995); *Bankston v. Burch*, 27 F.3d 164, 169 (5th Cir. 1994); *Miranti*, 3 F.3d at 929 (5th Cir.); *see also Kunica v. St. Jean Fin., Inc.*, 63 F.Supp.2d 342, 352 (S.D. N.Y. 1999); *Shrader v. Legg Mason Wood Walker, Inc.*, 880 F.Supp. 366, 368-71 (E.D. Pa. 1995); *Barraclough v. ADP Auto. Claims Serv.*, 818 F.Supp. 1310, 1313 (N.D. Cal. 1993).

[12] *Morgan Guar. Trust Co.*, 971 F.2d at 924 (2d Cir.).

[13] *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) (defendant refused request to remand, though acknowledging that court would likely order remand).

[14] *Morris*, 985 F.2d at 240 (6th Cir.); *Morgan Guar. Trust Co.*, 971 F.2d at 924 (2d Cir.).

award of fees" but "the entitlement is not automatic" and "the presumption is not irrebuttable."[15] The Fifth Circuit has held that an award of fees is not "routine if a party *improperly* removes an action to federal court." Instead, "'[f]ees should only be awarded if the removing defendant lacked 'objectively reasonable grounds to believe the removal was legally proper.'"[16]

Contrary to plaintiffs' argument, the differences between these statements create no real conflict among the circuits. Though employing different verbal formulas, each of the cited Court of Appeals' decisions upheld the district court's exercise of its discretion, except in the few instances when the district court erred in remanding the case. Plaintiffs have not pointed to a single case in which a different result was, or would have been, reached had another circuit's differently worded test been applied.

As the Tenth Circuit aptly stated in its decision below:

> Between these varied expressions regarding § 1447(c), there remains the broadly accepted position that if a defendant's removal could be fairly supported by the law at the time, even if later deemed incorrect, a district court's discretionary decision not to award fees is appropriate. Indeed, most courts do not impose fees when the defendant had a legitimate ground for seeking removal.

393 F.3d at 1147; Pet. 6a.

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[15] *Sirotzky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir. 2003).

[16] *Hornbuckle*, 385 F.3d at 541 & n. 5; *Valdes*, 199 F.3d at 293-94.

There is no conflict among the circuits warranting this Court's review.[17]

II. No Case Supports Plaintiffs' Proposed Test

Plaintiffs urge this Court to hold that fees should be routinely awarded under 28 U.S.C. § 1447(c) upon remand "absent some special or extraordinary circumstances" or at least when "the removal was an unsuccessful attempt to make law expanding the boundaries of federal removal jurisdiction." Pet. 10-13.

None of the hundreds of published lower court decisions on fee awards under 28 U.S.C. § 1447(c) adopts plaintiffs' proposed test. Many expressly reject it, holding that fees should *not* be awarded when the defendant had an objectively reasonable ground for believing that removal was proper – particularly when that belief is based on unsettled, unclear, complex, or developing law on jurisdictional issues.[18]

[17] It is unnecessary to review the district court decisions plaintiffs cite. Pet. 9. Plaintiffs cite only four of the hundreds of published district court decisions on this issue, *see* CHARLES ALAN WRIGHT, ET AL., *supra* n. 10, § 3739 at nn. 69-71, a sufficient indication in itself that the vast majority adhere to the rules stated in the text. The Courts of Appeals can correct the erring handful.

[18] *Martin*, 393 F.3d at 1151 (10th Cir.) (denial of fees no abuse of discretion "[g]iven the uncertain state of the law on aggregation of punitive damages"); *Roxbury Condominium Ass'n, Inc.*, 316 F.3d at 228 (3d Cir.) (fees not awardable when defendant has "colorable removal claim in an area of unsettled law"); *Valdes*, 199 F.3d at 293-94 (5th Cir.) (state law on viability of claim against non-diverse defendant only clarified by post-removal decision); *Virgin Islands Housing Auth.*, 27 F.3d at 917 (3d Cir.) (jurisdictional issue clarified only by post-removal decision); *see also McGettigan v. Ford Motor Co.*, 265 F.Supp.2d 1291, 1299 (S.D. Ala. 2003); *Greaves v. McAuley*, 264 F.Supp.2d 1078, 1088

(Continued on following page)

The sole support for plaintiffs' proposal is a single law review article which is based on the mistaken notion that Congress amended § 1447(c) in 1988 in order to reduce diversity jurisdiction and discourage removal. Pet. 10-11, citing Christopher R. McFadden, *Removal, Remand and Reimbursement under 28 U.S.C. § 1447(c)*, 87 Marq. L. Rev. 123, 139-40 (2003). The Judicial Improvements Act of 1988 did amend other provisions in order to narrow diversity jurisdiction, but the act evinced no hostility to removal. Further, the House Report on the act shows that the pertinent sentence was added to § 1447(c) for an entirely different reason; namely, to ensure that district courts retained authority to award expenses of improper removals despite the act's elimination of the former removal bond requirement.[19]

Federal fee-shifting statutes are interpreted in light of the public policies they are enacted to achieve. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-25 (1994). As there is no indication Congress added the key sentence to § 1447(c) in

(N.D. Ga. 2003); *Smith v. Health Center of Lake City, Inc.*, 252 F.Supp.2d 1336, 1346 (M.D. Fla. 2003); *Arlia ex rel. Massey Energy Co. v. Blankenship*, 234 F.Supp.2d 606, 614 (S.D. W.Va. 2002); *Brown v. Florida*, 208 F.Supp.2d 1344, 1351-52 (S.D. Fla. 2002); *Martin v. Mentor Corp.*, 142 F.Supp.2d 1346, 1349 (M.D. Fla. 2001); *Plute v. Roadway Package System, Inc.*, 141 F.Supp.2d 1005, 1012 (N.D. Cal. 2001); *In re Pfohl Bros. Landfill Litig.*, 67 F.Supp.2d 177, 185 (W.D. N.Y. 1999); *Chart Dev. Corp. v. West Slope Water Dist.*, 22 F.Supp.2d 1169, 1170 (D. Or. 1998); *Alcorn v. Union Pac. R.R. Co.*, 3 F.Supp.2d 1085, 1088 (W.D. Mo. 1998); *In re Potash Antitrust Litig.*, 866 F.Supp. 406, 414 (D. Minn. 1994); *California v. Steelcase, Inc.*, 792 F.Supp. 84, 87 (C.D. Cal. 1992); *General Elec. Capital Auto Lease, Inc. v. Mires*, 788 F.Supp. 948, 951 (E.D. Mich. 1992).

[19] H.R. REP. NO. 100-889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033; *see Wells' Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 157 F.Supp.2d 1018, 1042 (N.D. Iowa 2001).

order to encourage plaintiffs to file remand motions or to discourage defendants from seeking removal, neither *Piggie Park* nor *Christiansburg Garment*[20] applies here, just as they did not in *Fogerty*.

Instead, the rules developed by the lower courts in the cases cited in the preceding section properly effectuate Congress' intent. In § 1447(c), Congress adopted no uniform standard or test, but said simply that district courts "may" award fees on remand. By so doing, Congress intentionally conferred broad discretion on district courts. The propriety of the removal may be the principal factor, but as the decisions cited in footnotes 11-13 above show, a variety of other factors may also influence the district court's decision. The rigid test plaintiffs propose would rob district courts of the ability to tailor their decisions to these and other factors raised by the particular circumstances of the cases before them, contrary to Congress' intent.

In this case, the lower courts properly adhered to the rules stated in the preceding section in deciding plaintiffs' fee motion. Under those rules, fees were appropriately denied because defendants had objectively reasonable grounds for believing removal was proper based on unsettled and developing law. Both lower courts so held. Pet. 7a-13a, 17a-20a. Plaintiffs, themselves, considered the removal proper at the outset, changing their mind only when the district court disclosed its intention to rule against them on the merits.[21] The district court denied

[20] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

[21] *See Moline Mach., Ltd. v. Pillsbury Co.*, 259 F.Supp.2d 892, 905-06 (D. Minn. 2003) (denying fees because "the basis for removal was

(Continued on following page)

plaintiffs' belated remand motion and their later motion for § 1292(b) certification, finding there was "no substantial ground for difference of opinion" as to the propriety of the removal.

Ruling on the same question, another district court also denied fees on remand because of the unsettled state of the law in 1996 on aggregating punitive damages to meet the amount in controversy requirement. *Haisch v. Allstate Ins. Co.*, 942 F.Supp. 1245, 1252 (D. Ariz. 1996).

III. The Issue Is Not Important Enough To Warrant Review

As there is no real conflict among the circuits, this case would merit review only if the issue it presented for review were of great importance. The issue plaintiffs have raised does not approach the requisite level of significance.

The precise phrasing of the appropriate test for fee awards under 28 U.S.C. § 1447(c) is unlikely to affect the outcome of more than a handful of cases, unless the Court robs the district courts of discretion by adopting plaintiffs' unsupported test. So long as they retain substantial discretion, district courts are likely to reach the same results no matter how the legal standard or test is phrased.

The many published district court decisions awarding or denying fees under § 1447(c) prove the point. There is no evidence that district courts in one circuit award fees substantially more or less frequently than the district

sufficiently compelling that the Plaintiff did not mount any effort toward remand until late in the pretrial process").

courts in other circuits, despite the differences, which plaintiffs emphasize, between different circuits' phrasing of the test for fee awards under that statute.

Even were there a conflict among the circuits on this issue, it would cause few problems. Removal and remand of a case occurs entirely within a single circuit. The parties and the district court may tailor their conduct and decisions to the test adopted by the Court of Appeals for that circuit without any concern that they might later be judged by a different circuit's test.

Adopting plaintiffs' unsupported test to more liberally award fees on remand would not lower the volume of federal court business appreciably. A relatively small percentage of removed cases are remanded to state court. In very few of the remanded cases did the defendant have an objectively reasonable basis for believing removal was proper. A switch to plaintiffs' proposed test would, at most, affect only that small number of cases. More realistically, such a change would impact a tinier fraction still. The risk of owing the plaintiff a few thousand dollars in fees if the court ultimately finds the removal was improper is unlikely to deter many businesses from removing arguably removable cases.

There is no reason for this Court to grant review to announce a test that will achieve so little.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this Reply in support of their Petition for Writ of Certiorari. Despite Respondents' contentions, it is clear that (1) there is a split in the Circuits that fosters and permits an even wider divergence in the District Courts on the issue presented; (2) the split in lower court authority is worthy of this Court's review; (3) Petitioners' proposed resolution of the issue presented has substantial merit; and (4) this case is a perfect vehicle for resolving the issue.

1. There is a split in the Circuits that fosters and permits an even wider divergence in the District Courts on the issue presented.

On the question presented—what legal standard governs the decision whether to award fees and expenses under 28

U.S.C. § 1447(c) upon remanding a removed case to state court—there is indeed a split in the Circuits giving rise to an even wider divergence in the District Courts. Respondents' attempt to minimize the split is unavailing.

In the Circuits, the split is plain. The Fifth Circuit will not allow a fee award if there was a reasonable argument in favor of the removal. *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004). This is essentially the *Christiansburg Garment* standard.[1] The Third Circuit may agree, as shown in the Petition. Other Circuits including the Ninth and Tenth starkly disagree, and allow a fee award even if there was a reasonable argument in favor of the removal. *Martin v. Franklin Capital*, 393 F.3d 1143, 1147 n.3 (10th Cir. 2004) ("[I]n the Ninth Circuit, as in our circuit, if defendant's removal position is objectively reasonable under the law, the district court may, in its discretion, either award attorney's fees to the plaintiff or decline to award fees."). The Seventh Circuit even has an express presumption in favor of a fee award when a case is remanded. *Hart v. Wal-Mart Stores*, 360 F.3d 674, 678 (7th Cir. 2004).

In the Circuits that allow a fee award even in the face of a reasonable argument for removal, some District Judges do utilize that authority, while others do not. It may be true, as Respondents say, that most District Judges deny fees when there was a reasonable basis for removal. But others grant fees in the face of such a showing, as demonstrated in the Petition. And there is no way of getting a clear picture of how many District Judges fall into either camp, given the haphazard publishing patterns of District Court decisions.

The lower courts are therefore all over the map, from a *Piggie Park*[2] standard to a *Christiansburg Garment* standard, as shown in the Petition.

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[1] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)

[2] *Newman v. Piggie Park Enterp.*, 390 U.S. 400 (1968)

2. The split in lower court authority is worthy of this Court's review.

Respondents further try to minimize the importance of this split, but again this effort fails. Contrary to Respondents' argument, litigants even in a single Circuit (except for the Fifth) cannot now know what standard will be applied, and so cannot even conform their removals to the applicable Circuit's law. Furthermore, the need for a uniform national standard in this case is just as great as with any such issue. One could have said, with just as much force as Respondents' attempt to minimize the importance of a national standard here, that the issue of supplemental jurisdiction over added parties is not worthy of a national standard. But this Court's grant of review in *Exxon Mobil Corp. v. Allapattah Services*, No. 04-70 and *Ortega v. Starkist Foods*, No. 04-79, shows the error of such an argument. Matters such as this, setting fundamental rules for the exercise of federal court jurisdiction, truly should be governed by a uniform standard.

Moreover, choice of the standard will matter. In arguing that a decision by this Court would affect few cases, Respondents implicitly assume away the possibility that this Court would adopt Petitioners' proposed standard: that the existence of a reasonable argument for removal is *not* a valid basis for denying fees. But if this Court did adopt that standard, it is self-evident that the impact on the number of removals, and on the number of successful challenges to questionable removals, would be substantial for the reasons explained in the Petition.

3. Petitioners' proposed resolution of the issue has substantial merit.

The answer to the question presented will come, primarily, through understanding of the reasons for the Congressional enactment of the fee-shifting provision in § 1447(c). That has been the main factor in this Court's decision as to analo-

gous questions in *Piggie Park*, *Christiansburg Garment*, and *Fogerty v. Fantasy*,[3] as shown in the Petition.

The adoption of a *Christiansburg Garment*-like standard is inconsistent with the Congressional action. In arguing to the contrary, Respondents' core contention is that the fee-shifting language of § 1447(c) was not added in order to reduce wrongful removals. (Brief in Opposition, pp. 11-12). They describe it simply as a replacement for the "bond" provision that had existed under former law.

Even if Respondents were correct, this would not justify adoption of the *Christiansburg Garment*-like standard that was used in this case and is mandated by the Fifth Circuit. That standard is appropriate where, as in *Christiansburg Garment* itself, there is reason to believe that the Congress affirmatively wanted to foster the class of litigation behavior that is potentially subject to fees. But not even Respondents contend that the Congress affirmatively wanted defendants to have room to be creative and aggressive in removing cases, or that Congress wanted to reduce the deterrence of such creativity and aggressiveness.

But furthermore Respondents' analysis of the Congressional purpose is not correct. To the contrary, the fee-shifting provision of § 1447(c) was part and parcel of an Act of which the overall purpose was "to reduce substantially the diversity jurisdiction of the federal courts." *Tank v. Chorister*, 160 F.3d 597, 599 (10th Cir. 1998). And if Congress had wanted to keep the standard the same as it had been, it would have enacted no fee-shifting language at all; there was none in the old statute, and that is why fees had previously been awarded, if at all, only under the equitable "bad faith" exception to the American Rule. *See, e.g., Balcorta v. Twentieth-Century Fox*, 208 F.3d 1102, 1106 n.6 (9th Cir. 2000). The very adoption

[3] *Fogerty v. Fantasy*, 510 U.S. 517 (1994)

of fee-shifting language is itself proof that the Congress intended to increase the availability of fees, as part of the Act's overall scope and purpose of reducing docket congestion in federal courts.

Thus the Congress clearly meant for § 1447(c) to deter more removals and to foster more challenges to questionable removals. Congress must have had in mind that this Court would read its use of the word "may" more like the way that word was read in *Piggie Park*, and not the way that it was read in *Christiansburg Garment*. There is certainly no reason to infer that, unlike the Congressional intent that this Court has found under other fee-shifting statutes, the Congress meant for each court to be able to decide, on a case-by-case basis, whether to apply the *Piggie Park* rule or the *Christiansburg Garment* one.

4. This case is a perfect vehicle for resolving the issue.

Finally, this case squarely presents the issue and focuses directly on the true heart of the matter. The only things that Respondents say about this case in particular are all reducible to the single point that there was, at the time of removal, a reasonable argument in favor of removal. That was the reason fees were denied, and the reason that denial was affirmed. This case therefore presents, more starkly than any other, the bottom-line question that makes this case very important. Should, and can, a District Court use a *Christiansburg Garment*-like standard for fee awards under 28 U.S.C. § 1447(c)? This case will answer that question.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition should be granted.

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IN THE

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v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 23, 2005
CERTIORARI GRANTED APRIL 25, 2005

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Notice

The following materials have been omitted in the printing of this Joint Appendix and may be found in the Appendix to the Petition for Writ of Certiorari at the following pages.

Opinion in *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir. 2004) ("*Martin II*")	1a
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 96-1480 LH/RLP

GERALD T. AND JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/25/1996	1	NOTICE OF REMOVAL from 2nd Judicial District Case Number: 1:96:CV:8638 (referred to Magistrate Richard L. Puglisi); (copy of summons & complaint w/jury demand, consent to removal by deft Franklin Capital attached)
11/22/1996	2	ANSWER by deft Franklin Capital Corp [1-1]
03/06/1997	7	INITIAL DISCOVERY ORDER by Magistrate Richard L. Puglisi Discovery cutoff 8/4/97 (cc: all counsel)
05/09/1997	10	MOTION by deft Century-National Ins to dismiss for a failure to state a claim

DATE	NO.	PROCEEDINGS
09/11/1997	20	ORDER by Magistrate Richard L. Puglisi granting pltf's mtn to extend the time until 9/16/97 to file briefs on class certification [19-1] defts until 10/14/97 to respond and pltf until 11/4/97 to reply (cc: all counsel)
10/23/1997	25	MOTION by plaintiffs for order for class certification
11/25/1997	30	CLERK'S MINUTES: before Judge C. LeRoy Hansen of the hearing on the mtn to dismiss for a failure to state a claim [10-1] held on 11/25/97 C/R: Freda Donica
12/10/1997	32	ORDER by Judge C. LeRoy Hansen re the hearing held on deft's mtn to dismiss [30-1] the parties are to submit briefs to the Court on the jurisdictional issue (cc: all counsel)
12/15/1997	—	TRANSCRIPT OF PROCEEDINGS before Judge C. LeRoy Hansen held on 11/25/97; (re [30-1]) lodged in separate file folder
02/03/1998	38	MOTION by plaintiffs to remand case back to State Court for lack of subject matter jurisdiction
02/03/1998	39	MEMORANDUM by defendant Century-National Ins in opposition to motion to remand case back to State Court for lack of subject matter jurisdiction [38-1]
02/03/1998	40	MEMORANDUM by defendant Franklin Capital in opposition to motion to remand case back to State Court for lack of subject matter jurisdiction [38-1]

DATE	NO.	PROCEEDINGS
02/03/1998	41	REPLY by plaintiffs to defts memoranda in opposition to motion to remand case back to State Court for lack of subject matter jurisdiction [38-1]
02/20/1998	44	NOTICE of hearing before Judge C LeRoy Hansen setting hearing on motion to remand case back to State Court for lack of subject matter jurisdiction [38-1] at 9:00 am on 3/4/98 (CLERK: kg) (cc: all counsel by kg)
03/03/1998	45	NOTICE of hearing on pltf's mtn to remand case back to State Court for lack of subject matter jurisdiction [38-1] rescheduled for 4/14/98 at 9:00 am before Judge C. LeRoy Hansen (cc: all counsel electronically) [5k] [0 pages]
04/14/1998	49	CLERK'S MINUTES: before Judge C. LeRoy Hansen on motion to remand case back to State Court for lack of subject matter jurisdiction [38-1] (denied); motion for order for class certification [25-1] (denied) and on motion to dismiss for a failure to state a claim [10-1] (granted) held on 4/14/98; subsequent order to be issued on mtns addressed; C/R: Freda Donica
05/19/1998	—	TRANSCRIPT OF PROCEEDINGS before Judge C. LeRoy Hansen held on 4/14/98 at 9:00 am; (re [49-1]) lodged in separate file
05/21/1998	50	PARTIAL ORDER OF DISMISSAL by Judge C. LeRoy Hansen granting deft's motion to dismiss party for failure to state a claim [10-1] dismissing party Century-National Ins without prejudice (cc: all counsel)

DATE	NO.	PROCEEDINGS
05/21/1998	51	ORDER by Judge C. LeRoy Hansen denying pltf's motion for order for class certification [25-1] (cc: all counsel)
05/21/1998	52	ORDER by Judge C. LeRoy Hansen denying pltf's motion to remand case back to State Court for lack of subject matter jurisdiction [38-1] ("packaging" requirements are hereby suspended to allow pltfs to file interlocutory appeal) (cc: all counsel)
06/05/1998	55	MOTION by pltfs to amend the 5/21/98 Order denying pltfs' motion to remand
06/05/1998	56	MEMORANDUM by pltfs in support of motion to amend the 5/21/98 Order denying pltfs' motion to remand [55-1]
06/29/1998	57	RESPONSE by deft to pltf's motion to amend the 5/21/98 Order denying pltfs' motion to remand [55-1]
11/06/1998	58	MEMORANDUM, OPINION, AND ORDER: by Judge C. LeRoy Hansen denying pltfs' motion to amend the 5/21/98 Order (see Order as further described herein) [55-1] (cc: all counsel, electronically) [21k] [7 pages]
12/11/1998	60	RESPONSE by pltfs Gerald T Martin & Juana M Martin to Memorandum, Opinion Order filed on 11/6/98
03/30/1999	61	ORDER by Judge C. LeRoy Hansen granting pltfs' request for a voluntary dismissal with prejudice in order to file an appeal and obtain a ruling from the Tenth Circuit regarding whether or not diversity jurisdiction exists over the pltf's claims [60-1] (cc: all counsel)

DATE	NO.	PROCEEDINGS
03/30/1999	62	FINAL JUDGMENT: by Judge C. LeRoy Hansen dismissing this matter on the merits and resolves all remaining issues and adjudicates all rights and liabilities of the parties dismissing case with prejudice (cc: all counsel)
04/27/1999	63	NOTICE OF APPEAL by plaintiff Gerald T Martin, plaintiff Juana M Martin from Dist. Court decision [62-2]; Fees $105.00—Distribution as required. (cc: all counsel)
06/25/2001	65	COPY of judgment from USCA: defendants have failed to establish the requisite amount in controversy, and the USDC therefore lacked subject matter jurisdiciton; accordingly, the USDC Judgment is reversed and remanded with directions to remand to State Court [Appeal [63-1] [538k] [23 pages]
06/29/2001	66	ORDER by District Judge C. LeRoy Hansen upon remand from the Tenth Circuit Court of Appeals remanding this case to the Second Judicial District Court for the State of New Mexico 65-1] remanding case to state court (cc: all counsel*) [8k] [1 page]
07/09/2001	67	COPY of USCA Order: Taxing Costs in favor of Appellants/pltfs in the sum of $730.80
07/17/2001	68	MOTION by pltfs for an award of attorney fees and expenses (amounts not specified) [78k] [4 pages]

DATE	NO.	PROCEEDINGS
07/17/2001	69	MEMORANDUM by pltfs in support of motion for an award of attorney fees and expenses (amounts not specified) [68-1] [450k] [16 pages]
07/25/2001	73	RESPONSE by deft to pltfs' motion for an award of attorney fees and expenses [68-1] [402k] [12 pages]
01/24/2002	76	MEMORANDUM, OPINION, AND ORDER: by District Judge C. LeRoy Hansen denying pltf's motion for an award of attorney fees and expenses [68-1] (cc: all counsel*) [27k] [8 pages]
02/15/2002	77	NOTICE OF APPEAL by plaintiff Gerald T Martin, plaintiff Juana M Martin from Dist. Court decision [76-1]; Fees $105.00—Distribution as required. (cc: all counsel) [33k] [2 pages]
03/25/2002	79	CLERK'S ORDER settling costs, costs are taxed against defts in the amount of $612.58 (cc: all counsel*) [6k] [1 page]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-2048

GERALD T. AND JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2/22/02	(1488280) Civil case docketed. Preliminary record filed. DATE RECEIVED: 2/21/02. Transcript order form due 3/4/02 for Freda Donica pursuant to R.42.1. Docketing statement due 3/4/02 for Gerald T. Martin and Juana M. Martin. Notice of appearance due 3/4/02 for Franklin Capital, Gerald T. Martin and Juana M. Martin. (jal)
6/7/02	(1517234) Appellant's brief filed by Juana M. Martin and Gerald T. Martin. Original and 7 copies. c/s: y. Served on 6/6/02. Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 401. Appellee's brief due 7/9/02 for Century-National and Franklin Capital. (jal)

DATE	PROCEEDINGS
8/19/02	(1537316) Appellee's brief filed by Franklin Capital and Century-National. Original and 7 copies. c/s: y. Served on 8/13/02. Oral Argument? n. Appellants' optional reply brief due 8/30/02 for Gerald T. Martin and Juana M. Martin. (klp)
9/23/02	(1547441) Appellants' reply brief filed by Juana M. Martin and Gerald T. Martin. Original and 7 copies. c/s: y. (gah)
1/15/04	(1678460) Case argued by James M. Pietz for the appellant; Jan T. Chilton and Steven Douglas Looney for the appellee, and submitted to Judges Seymour, Briscoe, Payne. (hrs)
12/30/04	(1768803) Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Seymour, authoring judge; Briscoe; Payne. [02-2048] Parties served by mail on 12/30/04. (na)
1/21/05	(1774431) Mandate issued. (na)
3/4/05	(1788121) Petition for writ of certiorari filed on February 23, 2005 and placed on the docket February 8, 2005. Supreme Court Number 04-1140. (jmm)

STATE OF NEW MEXICO
IN THE DISTRICT COURT
FOR THE SECOND JUDICIAL DISTRICT

No. CV-96-0008638

GERALD T. MARTIN and JUANA M. MARTIN, individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation licensed to do business in New Mexico, and CENTURY NATIONAL INSURANCE, a California Corporation,
Defendants.

A JURY TRIAL IS DEMANDED

CLASS ACTION COMPLAINT

INTRODUCTION

1. This action is brought on behalf of a class of New Mexico Plaintiffs ("Borrowers") who financed the purchase of automobiles pursuant to Motor Vehicle Retail Installment Contracts ("Sales Contracts") that were thereafter assigned to Franklin Capital Corporation. In the Sales Contracts, the Borrowers agreed that property insurance or similar insurance protecting the assignee or seller could be purchased and the insurance premium could be added to the principal balance then owing under the Sales Contracts.

Instead, Franklin (the assignee) purchased and charged Borrowers for different, higher costing insurance and other illegal charges. Franklin is, therefore, subject to liability for

violations of New Mexico statutory law, breach of contract and breach of fiduciary duty and other violations as set forth below.

Century, by agreement with Franklin, or otherwise participating with Franklin with knowledge (or in reckless disregard) of the terms of Plaintiffs' contracts, tortiously interfered with their contracts.

PARTIES

2. The Representative Plaintiffs Gerald T. Martin and Juana M. Martin ("Martins") are individuals, that at all relevant times, resided in New Mexico at P. 0. Box 515, Crownpoint, New Mexico 87313.

3. Defendant Franklin Capital Corporation ("Franklin") is a Utah Corporation with principal offices at 47 West 200 South, Ste 500, Salt Lake City, Utah 84101. Franklin is a subsidiary of Franklin Resources, Inc., a Delaware Corporation located in San Mateo, CA, which is a holding company involved throughout the United States in investment management. Franklin is a privately owned corporation engaged, in part, in the purchase of Sales Contracts from car dealers in New Mexico and other states. In the course of this business, Franklin purchases insurance to insure its interests in the Sales Contract.

4. Century National Insurance ("Century") is a California Corporation with principal offices located at 12200 Sylvan Street, North Hollywood, CA 91606. Century is an automobile, fire and casualty insurance company. Century provides Vendor Single Interest insurance coverage to Franklin.

5. Dealers in this Complaint refer to automobile dealers in New Mexico who have contracted with Franklin for financial services. It does not include within its scope any of the Defendants.

FRANKLIN'S LIMITED RIGHT TO CHARGE BORROWERS FOR INSURANCE COVERAGE SIMILAR TO THE PROPERTY INSURANCE REQUIRED BY THE SALES CONTRACTS

6. Franklin enters into agreements with motor vehicle dealers in New Mexico to purchase Sales Contracts. Under such agreements the dealers agree to sell and assign to Franklin their Sales Contracts which are entered into between Dealers and Borrowers as part of the purchase and financing of motor vehicles sold by the Dealers. As part of these agreements between the Dealers and Franklin, standard form Sales Contracts are utilized with contract terms approved and/or required by Franklin.

7. The Sales Contracts require the Borrowers to maintain property insurance covering the vehicle's "full value," making the borrower the insured and the seller (or its. assignee) the loss payee. *See* Exhibit A, page 1, the Martins' Motor Vehicle Installment Contract, which was assigned to Franklin:

> *Property Insurance:* You promise to keep the motor vehicle described above insured for its full value against loss or damage and with a loss payable endorsement in our favor. YOU MAY OBTAIN YOUR REQUIRED INSURANCE FROM ANY COMPANY ACCEPTABLE TO US; HOWEVER, THE DEDUCTIBLE UNDER YOUR POLICY CANNOT EXCEED $500.

8. The Additional Terms, Agreements and Conditions, Section 5 on the back of the form Installment Contracts under the heading "Insurance" further require borrowers to obtain property insurance covering "not less than the balance due under the Contract," and to maintain such insurance until the Sales Contract is fully paid. The "Insurance" provision provided:

> Debtor agrees to keep the Property insured at its own expense against fire, theft, transportation, collision and

such other risks as Seller or assignee shall designate; such insurance shall be for an amount not less than the balance due under this Contract and shall be in force so long as any part thereof remains unpaid; such insurance is to be placed in insurance companies acceptable to Seller or assignee and loss thereon is to be paid to Seller or assignee and Debtor as their interests may appear.

9. The "Insurance" provision also contained a request from the borrower to the seller or assignee that at its option it could pay the premiums for "such insurance or similar insurance protecting the Seller or assignee only," *i.e.*, insurance similar to property insurance which the Borrower was required to maintain under the Sales Contract. In those instances where the seller or assignee exercised its option to pay the insurance, Franklin had an additional option to add the premium to the unpaid balance under the Sales Contract or alternatively require additional installment payments. The "Insurance" provision provided:

> Debtor hereby requests and authorizes Seller or assignee at Seller's or assignee's option and without obligation to do so, to pay the premiums either *for such insurance or similar insurance* protecting Seller or assignee only, adding same to principal balance then owing or by an advance which constitutes additional indebtedness and is secured hereunder and payable in additional installments due on this Contract. The policies therefor shall be held by Seller or assignee until this Contract is fully performed. (Emphasis added)

FRANKLIN'S SCHEME TO CHARGE BORROWERS FOR HIGHER COSTING, DIFFERENT INSURANCE THAN AGREED TO IN THE SALES CONTRACTS

10. Franklin, in exercising its option, did not charge Borrowers for "such or similar insurance protecting Seller or assignee only." Instead, Franklin purchased from Century and

charged Borrowers for higher costing and different insurance. The insurance purchased by Franklin and charged Borrowers was different in at least the following respects:

a) Franklin charged Borrowers for the cost of insurance premiums for the complete term of the Sales Contract based upon the unpaid balance at the time the insurance was purchased. Thus, Franklin charged the Martins up front 4-1/2 years of insurance premiums to be paid over the entire term of the Sales Contract, rather than semi-annual or annual premiums based upon the declining value of the vehicle. Multiple year property insurance coverage is unavailable to car buyers. Therefore the 4 year plus insurance coverage purchased by Franklin was not contractually authorized, because it was not "similar" to the property insurance available to the Martins.

b) Franklin charged the Martins for Century's insurance, which required that any refund, would be calculated by the Rule of 78s. Section 58-19-7 (D) NMSA, however, requires that Borrowers be credited with any refunds of unearned premiums and does not authorize the Rule of 78s.

c) The Borrower's Sales Contract provided that any prepayment of any unpaid principal balances would be calculated by the use of the accrual method and would not be subject to a penalty. Calculation of refunds by the Rule of 78s results in a penalty. And

d) Franklin purchased, placed, and charged purchasers for Vendor Single Interest ("VSI") insurance which covered insurance in excess of "fire, theft, transportation, collision and such other risks as Seller or Assignee shall designate" in violation of the Borrower's Sales Contracts.

11. Franklin at all material times knew, or should have known, that it was charging Borrowers for insurance distinctly different and more costly than the vehicle insurance agreed to in the Sales Contract. In this connection, Franklin entered into a master collateral protection insurance contract with Century so it could directly or indirectly financially benefit from charging Borrowers for more expensive insurance. The Master Policy provided that Franklin would purchase VSI from Century to cover its alleged interest in the Sales Contracts that it purchased from New Mexico car dealers. Franklin knew and Century knew or should have known that Borrowers would be charged for insurance that was different from and more expensive than the insurance required by the Sales Contracts.

FRANKLIN'S INSURANCE CHARGING SCHEME RESULTED IN SUBSTANTIAL OVERCHARGES BEING COLLECTED FROM PLAINTIFF-BORROWERS

12. On December 14, 1994 Gerald and Juana Martin agreed to purchase a 1994 Chevrolet from Casa-Chevrolet-Geo, Inc. ("Dealer") an automobile dealership at 7201 Albuquerque, New Mexico 87110. To finance the sale; the Martins executed a Sales Contract with the Dealer. *See* Ex. A attached. The Sales Contract explicitly provided that it would be governed by the laws of New Mexico.

13. The Martins' Sales Contract provided that the Martins would pay the Seller or assignee a total sale price of $33,157.00 including a finance charge of $6,374 (less a $3,937 downpayment). The term of the Sales Contract was for 5 years.

14. The Dealer, pursuant to a prior agreement, sold and assigned the Martins' Sales Contract to Franklin.

15. The Martin's Sales Contract contained form insurance provisions and provided that the Martins could obtain their own property insurance. On January 1, 1995 Franklin sent an

"Insurance Reminder Notice" to the Martins informing them that they were contractually required to maintain "comprehensive, fire, theft and collision coverage" on their financed motor vehicle for the five (5) year period December 12, 1994 to December 25, 1999. *See* Ex. B attached hereto which describes the vehicle insurance as follows:

> DEAR CUSTOMER: As you know, your installment contract requires that you maintain fire, theft, and collision damage insurance on your financed collateral for the term of the contract. Our records indicate that we have not received a current, valid policy covering our interests. . . .
>
> POLICY REQUIREMENTS: The insurance policy you furnish should provide Comprehensive, Fire, Theft and Collision coverage, be effective 12-14-94 to 12-25-99, and contain a Lienholder's Loss Payable endorsement in favor of the lienholder.

16. The "Reminder" further notified the Martins that failure to procure the specified coverages would result in Franklin placing a "Lienholder Minimum Protection Insurance" Policy ("LMPI Policy") which "protects our loan balance against loss caused by fire, theft, collision or upset". The "Reminder Notice" (Ex. B) provided:

> Insurance coverage is an essential requirement of the loan contract, and it is therefore necessary that your policy or binder be delivered to us within 10 days of the above date to avoid the necessity of our placing a Lienholder's Minimum Protection Policy (Insurance which protects our loan balance against loss caused by Fire, Theft, Collision or Upset.)

17. The "Reminder Notice" was unfair, deceptive, and/or fraudulent in at least the following respects:

A. The "Reminder Notice" falsely stated that the Martins were contractually required to obtain prepaid insurance for a term of 5 years;

B. The "Reminder Notice" failed to describe (or otherwise designate) the premiums and the actual coverages and the actual terms, exceptions, limitations and restrictions of the "LMPI" insurance that Franklin intended to purchase and charge to Borrower; and

C. The Notice falsely implied that only the cost of the insurance was going to be charged the Martins, and it withheld information that the charge would be greater than the actual "costs." It is believed that Franklin directly or indirectly received part of the premiums which, as required by the Sales Contract, should have been credited to the Borrowers' accounts.

18. On January 29, 1995 Franklin sent a "Notice of LMPI" to the Martins. *See* Ex. C. The "Notice of LMPI" again falsely advised Martins that the Sales Contract authorized Franklin to purchase and charge them for the insurance in fact charged and that Franklin had purchased and charged the Martins for a full five (5) years of coverage. The LMPI thus provided:

> DEAR CUSTOMER: . . . . This is to advise that we have ordered a Lienholder's Minimum Protection Insurance Plan Certificate effective 1214-94 thru 12-25-99 in accordance with the provision of the Retail Installment Contract.

19. The "Notice of LMPI" described the charges, coverage, limits of liability and deductible as follows:

COVERAGE	LIMITS OF LIABILITY	DEDUCTIBLE
	The *Lesser of*:	The *Larger* of:
A Collision or Upset	1. Actual Cash Value Less Deductible; or	1. $100; or
B Comprehensive-Loss or damage to the automobile, except by Collision or Upset	2. Net Unpaid Installment Contract Balance Less Delinquent Payments.	2. 20% of Amount of Loss (Maximum Deductible $250).

The cost of this Lienholder's Minimum Protection Plan Certificate for the term shown is $8,848.00

This amount, plus additional finance charges, will be charged to you thereby increasing your remaining contract balance.

20. The "Notice of LMPI" also described the "LMPI" as providing limited physical damage loss:

> The insurance bound is only with respect to the above collateral, for such and so many of the coverage specified and is subject to all the terms of the Certificate having reference thereto.
>
> PLEASE NOTE that this Lienholder's Minimum Protection Plan Certificate provides you with only limited protection against physical damage loss to the above vehicle and DOES NOT PROVIDE BODILY INJURY AND PROPERTY DAMAGE LIABILITY INSURANCE AND DOES NOT COMPLY WITH ANY FINANCIAL RESPONSIBILITY LAW.

21. The "Notice of LMPI" was unfair, deceptive, and/or fraudulent in at least the following respects:

A. The "Notice of LMPI" falsely stated that the Martins under their Sales Contract were responsible for the insurance purchased by Franklin for a term of five (5) years;

B. The "Notice of LMPI" failed to disclose the actual insurance costs paid by Franklin, the true coverages and the actual terms, exceptions, limitations and restrictions of the "LMPI" insurance that Franklin had purchased or had ordered and would charge to the Martins;

C. The "Notice of LMPI" falsely notified the Martins that they would have to pay $10 if they elected to cancel this insurance within the next thirty (30) days or an amount calculated by the Rule of 78's if cancelled thereafter; and

D. The "Notice of LMPI" falsely notified the Martins that they would have to pay for Franklin's insurance although it had a lower deductible of $250 instead of the required $500, which would have been much less expensive.

22. On June 11, 1995 Franklin sent a corrected Insurance Reminder Notice, (Ex. D) and on July 9, 1995 Franklin sent a corrected "Notice of LMPI." *See* Exhibit E. This Notice advised the Martins that a LMPI Policy had been ordered for the 4-1/2 year teen 6-10-95 through 12-25-99. (Ex. E) and stated that the 4-1/2 year term for the premium for Franklin's insurance as authorized as a charge under the Sales Contract was $7,636.00.

COVERAGE	LIMITS OF LIABILITY	DEDUCTIBLE
	The *Lesser* of:	
A Collision or Upset	1. Actual Cash Value Less Deductible; or	$500.00
B Comprehensive-Loss or damage to the automobile, except by Collision or Upset	2. Net Unpaid Installment Contract Balance Less Delinquent Payments.	

The cost of this Lienholder's Minimum Protection Plan Certificate for the term shown is $7,636.00

This amount, plus additional finance charges, will be charged to you thereby increasing your remaining contract balance.

23. The June 11, 1995 "Insurance Reminder" and the July 9, 1995 Notice of LMPI were unfair, deceptive and/or fraudulent in the same respect as the earlier Reminder and Notice of LMPI (except for the now corrected deductible amount) in that they falsely represented the type of insurance required and actually ordered and to be charged.

24. On August 6, 1995 Franklin and/or Century sent a Certificate of Insurance Add-on ("Add-On Notice") to the Martins advising that Franklin had placed the "LMPI" Policy and added $7,636.00 to their Sales Contract balance subject to the applicable 10% interest rate. Exhibit F.

25. The "Add On Notice", by its reference to California law, indicates that this insurance was not intended to comply with New Mexico law.

26. The Insurance Certificate was unfair, deceptive and/or fraudulent in that the Certificate falsely states that the Mar-

tins' Sales Contract required them to pay for Franklin's 4-1/2 year prepaid insurance coverage.

27. The August 8, 1995 certificate also advised the Martins that they could elect to pay the $7,636.00 in one payment or pay 52 equal installment payments of $180.66 financed at the contract rate of 10% in addition to their regular payments. *See* Ex. F. The Election form indicated that failure to make an election would result in the application of the installment option. The Martins failed to elect an option.

28. Franklin thereafter billed, charged and collected from the Martins and other Borrowers illegal and excessive late fees or delinquency charges. In this connection, New Mexico law Sec. 58-19-7 (E), only authorizes late fees of $15.00 or 5% of each installment whichever is less.

29. Franklin, however, billed, charged and collected from the Martins illegal late fees in excess of the lesser of $15.00 or 5% of the monthly installment. On July 6, 1995, August 5, 1995, and September 5, 1995, Franklin mailed late charge notices to the Martins. Ex. G. Each of these "Late Charge Notices" falsely and illegally billed the Martins for late fees in excess of the maximum allowable late fee.

30. As a result of Franklin's excessive charges to the Martins for 4-1/2 years of premiums of $7,636.00 which was added to the Martins' Sales Contract unpaid balance, the Martins could not pay these increased premiums and other illegal charges and shortly thereafter Franklin repossessed the Martins' automobile.

31. In repossessing the Martins' automobile and canceling their sales contract. Franklin illegally charged the Martins a $35.00 administrative fee. The Sales Contract and state law requires that the amount of the unpaid principal balance owed be calculated-by the Rule of 78s. *See* Exhibit 1, Section 8. The Sales Contract and 58-19-9 NMSA prohibit any other charge or penalty from being assessed.

32. Included in the Martins' Sales Contract was an extended service contract in the amount of $910.00. *See* Ex. H "General Motors Protection Plan Coverage Agreement" ("GMPP"). The GMPP provided that in instances of cancellation after 60 days the unused portion, less a $35.00 administrative fee, would be refunded. In canceling the Martins' GMPP, General Motors and Franklin agreed to recover the $35.00 from the Martins although such a charge was not authorized. In doing so, Franklin breached its contract with the Martins and violated 58-19-9 NMSA. Franklin has similarly charged numerous other class members for these illegal, unauthorized charges.

33. Finally, Franklin caused the Martin car to be repossessed and sold. In this connection, Martin's car was sold at auction for $13,800 by Salt Lake Auto Auction which subtracted $420.00 from the sale for its services leaving a balance of $13,380 which it tendered to Franklin. *See* the "Consignor's Statement", Exhibit."I".

34. Thereafter, Franklin charged the Martin's a second so-called repossession cost of $447.84 which was not authorized by the Parties' contract and/or N.M.Stat. §55-9-504 and which therefore was illegal.

35. Franklin's Insurance charging scheme resulted in substantial illegal overcharges being charged and collected from the Representative and Class Plaintiffs which scheme caused substantial damage to the Martins and thousands of other New Mexico borrowers.

CLASS ALLEGATIONS

36. This action is brought as a class action pursuant to SCRA 1-023 on behalf of all Borrowers who purchased automobiles from New Mexico car dealers pursuant to Motor Vehicle Retail Installment Contracts assigned to Franklin who have been charged for Franklin's Lienholders Minimum Protection Insurance.

37. The Class of Borrowers is believed to include more than a thousand New Mexico residents and is, therefore, so numerous as to make it impracticable to bring all members of the respective class before the Court. The exact number of Borrowers is unknown to the representative Plaintiffs, the Martins, but may be determined from the records maintained by Franklin. In many instances, such persons are unaware that claims exist on their behalf or, having knowledge of such claims, have, in most instances, sustained damages in such amounts that when taken individually are too small in number to justify the expense and effort required to bring suit separately, but whose damages are of such a significant size, if taken as a group, that they do justify the taking of legal action.

38. Common questions of law and fact affect the rights of each member of the Class. Among the predominating common questions of fact or law are:

A. What insurance coverage was Franklin contractually authorized to purchase and charge to Borrowers?

B. What insurance coverage did Franklin actually purchase and charge to Borrowers?

C. Was the insurance coverage Franklin actually purchased and charged to Borrowers "similar" coverage to the insurance coverage that Borrowers authorized Franklin to purchase and charge to them?

D. Did Franklin commit unfair, deceptive and/or unconscionable practices in violation of the Unfair Trade Practice by inflating the insurance cost charged to Borrowers?

E. Did Franklin violate the Unfair Insurance Practices Act by failing to disclose the actual insurance coverage charged to Borrowers?

F. Did Franklin breach its Sales Contracts with Borrowers by charging Borrowers for insurance coverage different and more expensive than that authorized by the Sales Contracts?

G. Did Franklin breach a fiduciary duty by procuring insurance different than that authorized by the Sales Contracts?

H. Did Franklin violate the Motor Vehicle Sales Finance Act by failing to disclose the actual insurance costs and insurance coverage that Franklin was authorized to charge Borrowers?

I. Was it legal for Franklin to contract with General Motors to charge Borrowers who cancelled their sales contracts a $35.00 "administrative fee" in connection with the "GMPP"?

J. Did Franklin's conduct constitute an intentional or negligent breach of a duty to disclose?

K. Did Franklin violate the sales contract and/or New Mexico's law by charging late fees that exceeded 5% of the undisclosed balance?

L. Did Franklin, in violation of its sales contracts and/or state law impermissibly charge the second repossession cost? and

M. Did Century tortiously interfere with the contractual rights of the Borrowers by separately agreeing with Franklin to sell, purchase, place and charge Borrowers for different and more expensive insurance than that authorized by the Sales Contracts and/or as designated by Franklin?

39. The Representative Plaintiffs, the Martins, will assure the adequate representation of all members of the class, and have no conflict with class members in the maintenance of this action. The Martins' claims are not only typical but

identical to the claims of the members of the Class. They have no relationship with Franklin or Century except as set forth in this Complaint, and are aware that they cannot settle this action without Court approval. Their interests in this action are antagonistic to the interests of Franklin or Century and they will vigorously pursue the claims of the Class.

40. The Representative Plaintiffs can acquire the financial resources to litigate this action. Moreover, undersigned counsel have agreed to advance all reasonable and necessary costs to litigate this action contingent on the outcome.

41. Retained counsel are experienced in litigating class actions and have handled many consumer and other types of class actions in the state and federal courts for and on behalf of other consumers. Counsel are handling this case on a contingent basis and will receive compensation for their professional services only as awarded by this Court.

42. A class action provides a fair and efficient method of adjudicating this controversy. The substantive claims of the Borrowers are identical and will require evidentiary proof of the same kind and application of the same law. Since Franklin and Century have treated and are treating all members of the Class in a similar and/or identical manner equitable and declaratory relief is appropriate with respect to the Class.

43. There are no unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the class fund will be minimized. The Martins believe, and therefore aver, that because members of the Class are unaware that their rights have been violated, or, if aware, would be unable to secure counsel to litigate their claims on an individual basis that a class action is the only proceeding in which they can recover. Individual actions, as a result of the doctrine of *stare decisis*, could substantially impair the

rights of the purported members of the class and an inconsistent adjudication would require Franklin to treat similarly and/or identically treated Class members differently.

44. The Martins are unaware of any other similar litigation against Franklin or Century and believe that this action will further the public policies underlying New Mexico law.

COUNT I

FRANKLIN'S VIOLATION OF THE UNFAIR PRACTICES ACT

45. The averments of the foregoing Paragraphs 1 through 44 are incorporated.

46. Franklin falsely represented that it could charge Borrowers for insurance for the entire term of their loan instead of only for no more than 6 months at a time.

47. Franklin concealed:

A. That the actual insurance-coverage that it was purchasing and charging to Borrowers was not authorized by their Sales Contract;

B. That Borrowers had to pay $10 if they purchased their own insurance within thirty (30) days after it was purchased by Franklin or thereafter a penalty, as calculated by the Rule of 78's, if they provided their own insurance;

C. That the insurance coverage that was purchased and charged to Borrowers by Franklin was more expensive than "Fire, Theft, Collision or Upset" insurance; and

D. That other charges (such as excessive late fees, repossession costs that were not contractually or legally justified or other fees) not authorized by the Sales Contract or by law would be billed, and as-

sessed by charging and collecting such excessive fees.

48. The conduct and/or false representations of Franklin constitute "unfair or deceptive trade practices as defined in Section 57-12-2 (D) NMSA including, but not limited to, the following specifically defined practices as listed in Sections 57-12-2(D) (5), (14) and (17):

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> (14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;
>
> (17) failure to deliver the quality or quantity of goods or services contracted for;

49. The conduct and/or representations of Franklin further constitutes an "unconscionable trade practices" within the meaning of 57-12-2(E) which provides:

> E. "unconscionable trade practice" means any act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services or in the extension of credit or in the collection of debts which to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
>
> (2) results in a gross disparity between the value received by a person and the price paid.

50. The Representative and Class Plaintiffs have been damaged by Franklin's violations of the Unfair Practices Act.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request judgment declaring that Franklin has violated the New Mexico Unfair Practices Act and awarding damages, treble damages and such other relief as authorized by 57-12-10 NMSA.

COUNT II

FRANKLIN'S VIOLATION OF THE UNFAIR INSURANCE PRACTICES ACT

51. The averments of the foregoing Paragraphs I through 50 are incorporated.

52. Franklin concealed material facts by charging Borrowers for insurance different from and more costly than that authorized by the Sales Contracts. Franklin's actions are unfair, deceptive or fraudulent practices within the meaning of Section 59A-16-3 NMSA. In this connection, any determination that Franklin has committed unfair or deceptive practices under the Unfair Insurance Practices Act in connection with its procurement of insurance also constitutes violation of the Unfair Insurance Practices Act.

53. Franklin's concealment of material facts constitute violations of Section 59A-16-4 (A), (E) and (G) which provide:

> 59A-16-4. Misrepresentation, false advertising of policies.
>
> No person shall make, publish, issue or circulate any estimate, illustration, circular, statement, sales presentation or comparison which:
>
> A. misrepresents the benefits, advantages, conditions or terms of any policy;
>
> * * * *

G. fails to disclose material facts reasonably necessary to prevent other statements made from being misleading.

54. The Representative and Class Plaintiffs have been damaged as a result of Franklin's violations of the Unfair Insurance Practices Act.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request judgment declaring that Franklin has violated the New Mexico Unfair Insurance Practices Act and awarding damages and such other relief as authorized by Section 59A-16-30 NMSA.

COUNT III

FRANKLIN'S VIOLATIONS OF THE MOTOR VEHICLE SALES FINANCE ACT

55. The foregoing Paragraphs 1 through 54 are incorporated.

56. The conduct of Franklin constitutes violations of Section 58-19-7(C) NMSA (the "Motor Vehicle Sales Finance Act") which provides:

> C. The amount, if any, included for insurance, which *may* be purchased by the holder of the retail installment contract, shall not exceed the applicable premiums chargeable in accordance with the rates filed with the department of insurance of the state corporation commission. If dual interest insurance on the motor vehicle is purchased by the holder, it shall within thirty days after execution of the retail installment contract send or cause to be sent to the buyer a policy or policies or certificate of insurance written by an insurance company authorized to do business in this state, clearly setting forth the amount of the premium, the kind or kinds of

> insurance, the coverages and all the terms, exceptions, limitations, restrictions and conditions of the contract or contracts of insurance. The buyer shall have the privilege of purchasing such insurance from an agent or broker of his own selection and of selecting an insurance company acceptable to the holder, and in such case, the inclusion of the insurance premium in the retail installment contract shall be optional with the seller.

57. Franklin violated Section 58-19-7(C) by charging Borrowers a rate for insurance in excess of that rate allowed by the New Mexico Department of Insurance.

58. Franklin violated Section 58-19-7(D) by purchasing and placing insurance requiring the use of the Rule of 78s in calculating insurance refunds since neither the contract or 58-19-7(D) NMSA authorizes the use of the Rule of 78s.

59. Franklin violated Section 58-19-7(E) by charging Plaintiffs excessive late or delinquency fees.

60. Franklin violated Section 58-19-9 by charging Plaintiffs a $35.00 fee in connection with the cancellation of the GMPP which was financed by the Sales Contract.

61. The Representative and Class Plaintiffs have been damaged as a result of Franklin's violations of the Motor Vehicle Sales Finance Act and are entitled to damages pursuant to Section 58-19-11(B) including the recovery of all finance, collection, delinquency and other charges paid.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs' request judgment against Franklin declaring them to be in violation of the Motor Vehicle Sales Finance Act and awarding damage pursuant to Section 58-19-11(B) NMSA and voiding the Sales Contracts and returning all amounts paid to Franklin by Plaintiffs.

COUNT IV

FRANKLIN'S BREACH OF CONTRACT

62. The averments of the foregoing Paragraphs 1 through 61 are incorporated.

63. Franklin, as the assignee, undertook the contractual duty to procure (where the option was exercised) "similar" insurance to the motor vehicle insurance which the Borrowers were required to obtain under their Sales Contracts and to charge, bill and collect only those charges authorized by the Sales Contract.

64. Franklin failed to perform its contractual obligations as follows:

A. The insurance coverage that it was purchasing and charging to Borrowers was not authorized by their Sales Contract;

B. Borrowers were charged for insurance for the entire term of their loan instead of for no more than 1 year;

C. Borrowers had to pay $10 if they purchased their own insurance within thirty (30) days after it was purchased by Franklin or thereafter if an insurance expense was charged, a penalty, as calculated by the Rule of 78's if they provided their own insurance;

D. Charging unauthorized repossession costs;

E. The insurance coverage that was purchased and charged to Borrowers by Franklin was more expensive than the "Fire, Theft, Collision or Upset" as authorized by the sales contract and/or as designated by Franklin; and

F. Borrowers were charged $35.00 for cancellation of the GMPP which was not authorized by the Sales Contract.

65. The Representative and Class Plaintiffs have been damaged by Franklin's breach of its contractual duties.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request that judgment be entered declaring that Franklin breached its contracts and awarding them damages and all other relief deemed appropriate by the Court.

COUNT V

FRANKLIN'S BREACH OF FIDUCIARY DUTY

66. The foregoing Paragraphs 1 through 65 are incorporated.

67. Franklin assumed a fiduciary duty to procure and charge for only that insurance authorized in the Sales Contracts if and when Franklin exercised its option to place insurance.

68. Franklin breached its fiduciary duty by procuring, charging and collecting for different and more expensive insurance which was not authorized by the Plaintiffs in their Sales Contracts and/or as designated by Franklin and by obtaining a secret fee or profit or commission.

69. The Representative and Class Plaintiffs have been damaged by Franklin's breach of fiduciary duty.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request that judgment be entered declaring that Franklin breached its fiduciary duty and awarding Plaintiffs compensatory damages, punitive damages and any other relief deemed just and proper by this Court.

COUNT VI

FRANKLIN'S FRAUDULENT CONCEALMENT AND BREACH OF A DUTY TO DISCLOSE

70. The foregoing Paragraphs 1 through 69 are incorporated.

71. Franklin assumed a duty to disclose to the Representative and Class Plaintiffs the actual cost and type of vehicle insurance to be procured on their behalf. Franklin's duty to disclose arose as a result of its fiduciary duty owed towards Plaintiffs in procuring insurance and in connection with its duties in providing Plaintiffs with insurance coverage.

72. Franklin breached its duty to disclose by concealing and failing to disclose to Borrowers that it was providing different and higher costing insurance than that authorized by the Sales Contract. Franklin also breached its duty to disclose by concealing and failing to disclose that it was billing and charging Plaintiffs for other charges not authorized by the Sales Contracts. Borrowers had a right to reasonably rely on Franklin to bill, charge and collect only those amounts authorized by the their Sales Contracts.

73. Franklin's conduct in concealing and failing to disclose was intentional and/or negligent and has damaged the Plaintiffs.

RELIEF

WHEREFORE, the Representative and Class Plaintiffs request that judgment be entered declaring that Franklin breached a duty to disclose by concealment and nondisclosure and awarding them compensatory damages, punitive damages and all other relief deemed appropriate by the Court.

COUNT VII

CENTURY'S TORTIOUS INTERFERENCE WITH PLAINTIFFS' CONTRACTUAL RELATIONS

74. The foregoing Paragraphs 1 through 73 are incorporated.

75. Century knew or recklessly disregarded available information that under the Sales Contract, Franklin's right to purchase insurance at Plaintiffs' expense was limited to "similar" insurance and, therefore, was limited as to both types of coverages and required term of the loan.

76. It is believed and therefore averred that Century directly or indirectly paid Franklin or its affiliates or subsidiaries a commission or ratio which amounts should have been credited to reduce the Plaintiffs' unpaid balance.

77. Century tortiously interfered with the contractual relationship between the Plaintiffs and Franklin by financially inducing and assisting Franklin in its scheme to overcharge Plaintiffs.

78. As a direct and proximate result of Century's tortious actions, the Representative and Class Plaintiffs have suffered economic loss or injury.

RELIEF

WHEREFORE, the Plaintiffs request that judgment be entered declaring that Century tortiously interfered with Plaintiffs' contractual rights and awarding them compensatory damages, punitive damages and all other relief deemed just and proper by the Court.

[signatures and exhibits omitted in this printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV. 96-1480 LH/RLP

GERALD T. MARTIN and JUANA M. MARTIN, Individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,
Defendants.

NOTICE OF REMOVAL

Defendant Century-National Insurance Company, with the consent and concurrence of Defendant Franklin Capital Corporation, respectfully shows the court as follows:

1. A civil action has been commenced and is now pending in the Second Judicial District Court, Bernalillo County, New Mexico, Cause No. CV 96-0008638, in which Gerald T. Martin and Juana M. Martin have filed suit against Franklin Capital Corporation and Century-National Insurance Company.

2. Plaintiffs' initial pleading entitled "Class Action Complaint" alleged that Franklin Capital Corporation violated the New Mexico Unfair Practices Act, the New Mexico Unfair Insurance Practices Act, the Motor Vehicle Sales Finance Act and breached its contract, its fiduciary duty and its duty to disclose. The Class Action Complaint alleged that Century-National Insurance Company interfered with plaintiffs' contractual relations.

3. The two named plaintiffs are citizens of the State of New Mexico. See, complaint, ¶ 2. The putative class members are New Mexico citizens. *See*, complaint, ¶ 37. Each of the defendants is a foreign corporation incorporated in a state other than New Mexico and having its principal place of business in a state other than New Mexico. *See*, complaint, ¶¶ 2, 3 and 4. There is complete diversity of citizenship between the parties.

4. The amount in controversy, exclusive of interest and costs, cannot be determined from the face of the complaint. However, the class representatives standing alone appear to satisfy the requisite $50,000 in controversy because:

A. They allege an entitlement to compensatory damages as well as statutory damages. In the case of statutory damages, the class representatives claim an entitlement to treble damages under the New Mexico Unfair Practices Act, NMSA 1978 § 57-12-10. *See*, complaint, page 19. The named plaintiffs also claim a right to forfeiture of all finance charges, delinquency charges and collection and other charges by the holder of their retail installment contract, pursuant to the New Mexico Motor Vehicle Sales Finance Act. *See*, complaint, page 22. The named plaintiffs also seek to void their retail installment contract in its entirety. *See*, complaint, page 22.

B. They allege an entitlement to punitive damages under their common law claims. *See*, complaint, page 24, 25, 26. Claims for punitive damages must be included in the computation of the amount in controversy. *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, 88 L.Ed. 15 (1993).

C. They allege an entitlement to attorney fees under all of their claims. *See*, complaint, ¶ 41. The attorney fees of the entire class are attributable to the named plaintiffs for purposes of satisfying the jurisdictional amount. In re Abbott, 51 F.3d 524 (5th Cir. 1995).

"In a class action, so long as the class representatives meet the amount-in-controversy requirement, all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims." *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 523 (D.C. Tex. 1995).

Even if the claims of the class representatives standing alone do not satisfy the requisite amount in controversy, punitive damage claims in a class action suit may be considered in the aggregate when determining the amount in controversy. *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). Thus, removal is proper although individual transactions may not reach the jurisdictional amount, since punitive damages are a collective right in which putative class members have a common, undivided interest. *Tapscott*, 77 F.3d at 1358.

5. This court has original jurisdiction of this action under 28 U.S.C. § 1332. Pursuant to 28 U.S.C. §§ 1441 and 1446, this action may be removed to this court.

6. Copies of all process, pleadings, and orders served upon defendants are attached hereto as Exhibit "A" and made a part hereof.

7. This action was commenced September 13, 1996. Century-National Insurance Company first received a copy of the summons and complaint, through service or otherwise, on September 27, 1996. Upon information and belief, Franklin Capital Corporation first received a copy of the summons and complaint, through service or otherwise, on October 14, 1996. Accordingly, 30 days have not elapsed since the first receipt of the summons and complaint by the defendants in this action, and removal is therefore timely.

8. Defendants, immediately upon filing this notice, have given written notice thereof to plaintiffs as required by 28 U.S.C. § 1446(d) and have filed a copy of said petition with the clerk of the court from which this action was removed.

9. The consent and concurrence with this removal by Franklin Capital Corporation is reflected on the Consent to Removal, a copy of which is attached hereto as Exhibit B and made a part hereof.

WHEREFORE, Century-National Insurance Company, with the consent and concurrence of Franklin Capital Corporation, hereby requests this court to remove Cause No. CV 96-0008638 from the Second Judicial District Court, County of Bernalillo, State of New Mexico, into this court for trial and determination.

[signatures and exhibits omitted in this printing]

Excerpts of Transcript of Proceedings in
U.S. District Court

November 25, 1997 (pp. 29-36)

MR. MALAKOFF: . . . And, finally, I would—I would like to raise one issue with the Court that could be raised at a later time, and that's simply that based on the affidavits that Franklin filed which are not before the Court, that I don't believe there's jurisdiction with this Court, and we would request the Court to set up a briefing schedule requiring Century and Franklin to justify the removal from state to federal court because we don't believe there is jurisdiction. And they've taken inconsistent positions—

THE COURT: Well, I have considered that issue, and I was concerned about whether or not the petition for removal adequately alleged the appropriate amount of damages, but I have not made any analysis of that. I was wondering if that was adequate. If you want that brought to the Court's attention, it's your obligation to do so. And I'm not sure that at this point in time it's well taken. There is some kind of limitation on the time within which such motions may be filed under the diversity jurisdiction. So I'm not going to do anything about that right now. You can file a motion if you wish, and it will be addressed as every other motion, okay?

* * * *

MR. MALAKOFF: Thank you, Your Honor. Just at the time of removal, we interpreted the removal to be the plaintiffs' arguably had a claim over 50,000. Of course, there was no evidence that each class member had a claim of over 50,000. But as this Court knows, the Seven Circuit, in *Strongberg*, which is at 77 F.3d 721, and earlier the Fifth Circuit in *Abbott* at 51 F.3d 524, both found that the *Ezon* case, which said you could not aggravate, had been overruled by Congress. And so based on the removal at that time, we decided not to contest jurisdiction.

However, last month Franklin put in an affidavit which the Court does not have because it's not been filed yet, and in that affidavit Franklin stated that the Martins had made no payments for the PSI insurance. We disagree with that, but we now have a contention in the record between Century's removal papers which Franklin joined in and the—it's an October 10th dated affidavit which we received on October 21 which put us in a position where we became concerned about jurisdiction because while we have a strong preference to be in federal court normally, its—the fact of the matter is we don't want to litigate for a couple of years and then go to a circuit where there's no jurisdiction.

THE COURT: I don't either.

MR. MALAKOFF: With respect to the Court's timeliness concerns, there is a 30-day requirement, and I think it's 20 U.S.C. 1441, but that does not apply to subject matter jurisdiction. It would certainly apply to personal jurisdiction in other matters, but subject matter jurisdiction is always an issue in front of the federal court and, in fact, could either be raised at the Tenth Circuit or the Supreme Court for the first time and would have to be considered. It is not subject to any limitation. And, therefore, in light of the fact that the only basis we know to support jurisdiction which we were willing to accept indicated that there was jurisdiction until this affidavit was submitted to us on October 21, we were willing to accept that.

I don't believe it is our burden to show that this Court has jurisdiction since we didn't come here, but if the Court wants us to take that burden, we will do so.

THE COURT: You're today asserting that the Court does not have jurisdiction. Isn't that what you're doing?

MR. MALAKOFF: Yes, I am, Your Honor, based on Franklin's affidavit.

* * * *

THE COURT: . . . If you wish to file a motion attacking the Court's jurisdiction, please do so. I'd be delighted if I didn't have jurisdiction over this case.

MR. MALAKOFF: We will do so, and we'll do it in accordance with local Rule 7.

* * * *

THE COURT: Here's what I'm going to do: I'm going to grant your motion to amend contingent upon this Court finding that it has jurisdiction following your filing of a motion attacking this Court's jurisdiction. Do you understand?

MR. MALAKOFF: I do; Your Honor. I would hate to use the word "attack." It's—

THE COURT: That's what it is.

MR. MALAKOFF: The jurisdiction, as the Court knows, is dividing the federal courts of this country. And in terms of district courts, one could easily cite 25 or 30 cases that interpret 1367 rulings and the same number going the other way. It's—my only concern is that in light of that, of Franklin's affidavit, we not go too far down the path at this point until we learn the views of this Court.

THE COURT: Mr. Malakoff, I used the word "attack," you didn't use it. That's what it is. I don't mind my jurisdiction being attacked. I am not offended by that. As a matter of fact, I enjoy it, okay?

* * * *

THE COURT: Yes, I'll just take that under advisement, the motion to dismiss under advisement at this time. I will tell you that I'm inclined, if I should have to rule today on the motion to dismiss, to dismiss it based upon the allegations of the complaint with respect to Century.

MR. MALAKOFF: I think I can sense that, Your Honor. And I certainly apologize for the inadequate pleading we provided the Court. I believe now that we do have the Rule 26(a) discovery and we do have the answers to our interrogatories and requests, we can fill in the gaps that the Court correctly observed existed.

Excerpt of Transcript of Proceedings in U.S. District Court

April 14, 1998 (pp. 46-48)

THE COURT: . . . I must determine whether or not the Court has jurisdiction based upon the allegations of the complaint, whether the allegations of the complaint are valid under the law or not. The allegations of the complaint, as counsel for defendants said, request that the—all amounts paid be recovered or returned to the plaintiff by Franklin, and asks that the sales contracts be voided. Plaintiff asserts that that was inconsistent with 58-19-11(B), and it may be. But its' still a demand for recovery. What does that include? Those items are enumerated in the briefs of both the defendants, which include the down payment of $3,937, finance charge of $6,374, insurance premiums of $7,636, finance charge of $1,758, late fees of $81, administration fees of $35 on two different occasions out of complaint paragraphs 31 and 32, and a repossession service charge in paragraph 33, and a second repossession service charge.

Now, I can use those words and obtain in excess of $50,000 by trebling those items. Then I can add a reasonable attorneys' fee to that and also assume that if the plaintiff prevails that I would instruct a jury that punitive damages are awardable. If we're only talking about the plaintiff, the attorneys' fees and punitive damages are not going to be $50,000 for attorneys' fees and some other unknown number for punitive damages, but the elimination of the down payment number, if that is inappropriately included in the trebling, would amount to less than $12,000. Given the amount of work that has already been expended in this case, it would be incredible for me to conclude that there has not been substantially more than $12,000 in fees incurred by the plaintiffs' attorneys, even if this case is not certified as a class. The complaint itself, when reviewed, would compel that conclusion by this Court, without reference to the pleadings—

excuse me, the briefs that have been filed since the complaint was filed.

I do not decide because I believe it unnecessary whether punitive damages need to be or may be aggregated to satisfy a jurisdictional minimum. I will observe that the purpose of this case, as counsel for defendants have noted, is not to recover $3,000 for this plaintiff, if that's the only damages they have, but rather to utilize the class action vehicle provided in the federal rules to recover similar kinds of damages perhaps on behalf of a number of other plaintiffs, assuming that there is numerosity here and an aggregate of many times more what the plaintiffs' attorney might recover in attorneys' fees for just this plaintiff.

All those matters considered, I conclude that this Court has jurisdiction. And, as I mentioned in our last hearing, that's not a terribly happy thought for me because if this class eventually does get certified as a class, it's not the kind of case that I would look forward to coming to the office to deal with. So I also note for counsels' edification that I don't want to take jurisdiction over something that I don't have jurisdiction over, but I am required to exercise my jurisdiction when it appears on the face of the complaint. So I will deny the motion to remand.

And I thank you, Mr. Malakoff, for filing this motion and these briefs and doing an able job because after the issue was raised by you, it was my request of you to do that, and I appreciate that.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV. 96-1480 LH/RLP

GERALD T. MARTIN and JUANA M. MARTIN, Individually and on behalf of all persons similarly situated,
Plaintiffs,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' motion to certify for immediate appeal this Court's May 21, 1998 order denying the Plaintiffs' motion to remand. (Docket No. 55).[1] The Court, having read the pleadings of both parties and being fully advised in the premises, finds that Plaintiffs' motion is not well taken and shall be denied.

Plaintiffs' motion is brought pursuant to 28 U.S.C. § 1292(b):

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground

[1] Plaintiffs seek amendment of this Court's May 21, 1988 order to include certification of interlocutory appeal language under 28 U.S.C. 1292(b). The actual title of this motion is "Motion to Amend the May 21, 1988 Order Denying Plaintiffs' Motion to Remand to Allow Interlocutory Review Under § 1292(b)".

> for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Federal courts universally recognize that § 1292(b) should be construed strictly and that appeals under this section are disfavored and should be allowed only sparingly. *See, In re Ingram Towing Co.*, 59 F.3d 513 (5th Cir. 1995). The party seeking certification for interlocutory appeal bears the heavy burden of showing that the order in question is exceptional. *See, In re Flor*, 79 F.3d 281 (2d Cir. 1996). An order is considered exceptional for example, where the appellate court's immediate review of the order may avoid extensive and costly litigation. *Terra Intern.* v. *Mississippi Chemical Corp.*, 922 F. Supp 1334 (N.D. Iowa 1996), *aff'd* 119 F.3d 688 (8th Cir. 1997). Generally, courts should decline to override the important historic policy against piecemeal litigation and appeals. *See PYCA Indus. Inc.* v. *Harrison County Waster Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996).

Before reviewing each of the three prerequisites of § 1292(b),[2] I note that the order in question involves this court's refusal to remand this case to state court—a highly discretionary decision. This discretionary nature of the decision generally operates against satisfaction of the first two requirements: that the order presents a "(1) controlling questions of law on which there is (2) substantial ground for difference of opinion". Given the discretionary nature of the decision, it is difficult for the Plaintiffs to successfully assert that the "difference of opinion" element is compelling.

The three questions posed by Plaintiffs for certification involve the methods used by this Court in determining whether

[2] The party seeking certification must satisfy all three criteria; satisfaction of a single criterion, standing alone, cannot be determinative. *See Katz v. Carte Blanche Corp.*, 496 E.2d 747, 754 (3rd Cir. 1974).

the Plaintiffs' claims meet the amount in controversy requirements of 28 U.S.C. § 1332. Specifically, Plaintiffs frame what they consider to be three "controlling legal" questions, as follows:

1. Whether a district court can disregard state law in determining whether a plaintiff's pled state statutory law claims exceed the amount in controversy requirements of 28 U.S.C. § 1332?

Plaintiffs argue that this Court disregarded state law and focused only on the allegations of the complaint to determine whether the alleged damages would meet the $50,000[3] jurisdictional limit contained in 28 U.S.C. § 1332. In other words, Plaintiffs argue that their damages should be determined based on state statutory law, which they argue demonstrates that the complaint does not state a viable claim to "void" the Martin contract as pled. Plaintiffs assert that their complaint does not meet the $50,000 jurisdictional limit required by § 1332. It is their position that this Court should have, but did not, carefully analyze whether any state statutory claims for damages are colorable under state law before it can conclude that it has subject matter jurisdiction.

I have read the cases cited by Plaintiffs. I read these cases as stating that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co.* v. *Red Cab. Co.*, 303 U.S. 283, 289 (1938); and that legally impossible damages flunk the "legal certainty" test. *Pratt Central Park Limited Partnership* v. *Dames & Moore, Inc.*, 60 F3d. 350 (7th Cir. 1995). At the April 14, 1998 hearing, I stated on the record my reasons for concluding that the Martins' claims meet the requisite jurisdictional amount. It does not appear to

[3] This cause of action arose before the new amount in controversy requirement of $75,000 went into effect. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996).

a legal certainty that their claims are for less than $50,000 and I conclude that they are colorable for the purposes of conferring jurisdiction. In making this determination, I have not disregarded state law, but in fact have considered it. I conclude that there is no substantial ground for a difference of opinion on this matter.

2. Whether a district court in a removal proceeding under 28 U.S.C. § 1447 can disregard the class allegations pled in the complaint at the time of a defendant's removal when it determines whether or not it has subject jurisdiction?

Plaintiffs argue that this Court should have, but did not, consider whether remand would be proper at the time of removal, considering the class allegations in the removed complaint. They argue that the plain language of 28 U.S.C. § 1447(c) and Supreme Court case law demonstrate that this Court is required to make this jurisdictional determination with respect to putative class members in ruling on a motion to remand, before it can properly assert subject matter jurisdiction in this case, *citing Zahn* v. *International Paper Co.*, 414 US 291 (1973). They argue that the fact that this action was not certified as a class action does not alter this responsibility. For there to be diversity jurisdiction, they contend that there must be complete diversity between the named representatives of the putative class and the defendants, and that each member of the putative class must meet the statutorily required minimum amount in controversy.

My examination of the Notice of Removal and of the "Class Action Complaint" leads me to conclude that complete diversity of citizenship exists between the two named Plaintiffs, the putative class members and the defendants. *See Notice of Removal*, ¶ 3. Furthermore, in the section above, I have addressed my conclusion that Plaintiff Martins' asserted claims are colorably worth the jurisdictional amount of $50,000. As I read the "Class Action Complaint", each of the

putative class members are, as noted in the caption, "similarly situated" to the Martin Plaintiffs. In fact, the relief sought for each and every count of the complaint is the same for the Martins, as class representatives, and for the putative class plaintiffs. This fact leads me to conclude that, based upon the allegations of the complaint at the time of removal, the claims of the putative class members were sufficient to invoke the diversity jurisdiction of this Court.[4] The complaint, at the time it was filed, satisfied the jurisdictional amount required by 28 U.S.C. § 1332.[5]

My exercise of subject matter jurisdiction over the remand issue was properly based upon these considerations of the class allegations as of the time of removal. I conclude there is no substantial ground for difference of opinion on this issue.

3. Whether a district court may retain jurisdiction under its 28 U.S.C. § 1367 supplemental jurisdiction after the Plaintiffs and Defendants agree that Martins' individual plead claims do not (and therefore, did not) establish an amount in controversy sufficient to satisfy § 1332?

Plaintiffs correctly argue that if it is discovered, anytime during the course of litigation, that at the time the action was

[4] Although it is not necessary to this Opinion, I note that the Fifth Circuit has held that *Zahn*'s holding that each plaintiff must independently satisfy the jurisdictional amount has been overruled due to congressional amendment of 28 U.S.C. § 1367. *See In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995). *See also Ard et al. v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 600 n.2 (5th Cir. 1998), *reh. denied.*

[5] The Court notes that, based upon facts presented to it relating to the class certification issue, that it became apparent that the putative class members did not have sufficient commonality of claims to justify such a certification. The Court accordingly declined to certify a class. Nonetheless, the claims as contained in the complaint at the time of removal were colorable and sufficient for purposes of this jurisdictional determination.

commenced, the claims did not exceed the jurisdictional amount, then the complaint must be dismissed. *Watson* v. *Blankinship*, 20 F.3d 383, 385 (10th Cir. 1994). They argue that the Court erred in not considering the Affidavit of Harold Miller that showed that at the time of removal, the Martins' insurance claim was $1,854.08, not $7,636, because of a 1996 refund. Plaintiffs ask that because now that it is known that at the time of removal the claims did not meet the jurisdictional amount, the case should be dismissed. They argue that because there is no basis for this Court to continue to assert jurisdiction, the case should be remanded to state court.

The amount in controversy requirement is determined at the time the complaint was filed. *See Emland Builders, Inc.* v. *Shea*, 359 F.2d 927, 929 (10th Cir. 1996). I have reviewed Mr. Moore's Affidavit. Even if I use the figure of $1854 instead of $7636 for the insurance premium element of damages, as set out in Moore's affidavit, Plaintiffs' claims meet the jurisdictional limit, when reasonable attorney fees are added into the equation. *See Smith* v. *Hawkeye-Security Ins. Co.*, 842 F. Supp. 1373 (1994). I elaborated upon this at my oral ruling at the April 14, 1998 hearing in this matter. I find no substantial ground for a difference of opinion on this issue.

Furthermore, to the extent that it has been revealed during discovery that any putative class members were not actually "similarly situated" to the Martins with regard to their respective insurance situations, I have rejected them as potential parties in this lawsuit, and due to a lack of commonality of claims, refused to certify a class. It would now appear, post-removal, that the putative class members do not satisfy the jurisdictional amount. I realize that *Zahn* requires that district courts may entertain the claims of only those class action plaintiffs whose individual cases satisfied the jurisdictional-amount requirement. *Id* at. 297-98. I have already declined to exercise subject matter jurisdiction over these putative plaintiffs, which renders an analysis under *Zahn* unnecessary.

Conclusion

For the reasons set forth above, I conclude that Plaintiffs have not satisfied all three requirements under 28 U.S.C. § 1292(b) and that Plaintiff's motion to certify for immediate appeal shall be denied.

As discussed at the April hearing in this matter, Plaintiffs are now granted leave to file a motion to amend their complaint with the Court. If they desire to file such a motion, they are instructed to attach a copy of their proposed amended complaint to the motion. Such a motion must be filed within thirty (30) days of the date of entry of this Memorandum Opinion and Order. Discovery shall be stayed, pending the Court's decision on the Plaintiffs' motion to amend.

IT IS SO ORDERED.

/s/ LeRoy Hansen
LEROY HANSEN
U.S. DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 29, 2001]

No. 99-2131

GERALD T. MARTIN and JUANA M. MARTIN, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-1480-LH)

Before SEYMOUR and MURPHY, *Circuit Judges*, and KANE, *Senior District Judge*.*

SEYMOUR, *Chief Judge*.

Gerald and Juana Martin appeal the district court's order dismissing their complaint with prejudice. We conclude that we have jurisdiction over this appeal, and that the district court lacked subject matter jurisdiction. Accordingly, we reverse and remand with directions to remand this action to state court.

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* Honorable John L. Kane, Jr., Senior District Court Judge, District of Colorado, sitting by designation.

I

The Martins originally brought this proceeding in New Mexico state court, individually and on behalf of all persons similarly situated, seeking damages under state statutory and common law for alleged illegalities with respect to automotive financing and insurance contracts. The plaintiff class alleged defendant Franklin Capital Corporation, which purchased their installment sales contracts from car dealers, deliberately over-charged them for required insurance coverage purchased through defendant Century National Insurance. Invoking diversity of citizenship, Century removed the case to federal court with the consent of Franklin. The Martins then filed a motion to remand to state court for lack of subject matter jurisdiction, arguing their claims did not meet the $50,000 amount-in-controversy requirement for diversity jurisdiction.[1]

In orders entered the same day, the district court denied the Martins' motion to remand, denied the Martins' motion for class certification, and granted Century's motion to dismiss for failure to state a claim. This left the Martins with an individual case against Franklin in the federal district court. The Martins subsequently requested that the court certify the order denying remand for immediate appeal under 28 U.S.C. § 1292(b), which the court denied. The district court order denying the Martins' motion to remand contains virtually no comment or analysis supporting its decision. However, in its memorandum opinion and order denying the Martins' section 1292(b) motion, the court addressed the amount-in-controversy requirement by stating "[i]t does not appear to a legal

[1] This action was filed in state court on September 13, 1996. At that time, 28 U.S.C. § 1332 required the amount in controversy to exceed $50,000. Although Congress subsequently amended the statute to increase the jurisdictional amount to $75,000, the amendment applies only to cases filed on or after January 17, 1997. *See* Federal Courts Improvement Act of 1996, § 205, Pub. L. No. 104-317, 110 Stat. 3847, 3850 (Oct. 19, 1996).

certainty that [the Martins'] claims are for less than $50,000 and I conclude that they are colorable for the purposes of conferring jurisdiction." Aplt. App., doc. 13 at 3.

It thus appears that, in assessing the evidence, the court required the Martins to prove to a legal certainty that their claims were below the jurisdictional amount rather than placing the burden on defendants to show by a preponderance of the evidence that the amount was met. The court also appears to have attributed to the Martins all of the attorneys fees requested on behalf of the class. *See id.* at 6. The court held that any putative class members whose claims did not satisfy the jurisdictional amount were irrelevant because they had already been removed from the case by the court's order refusing to certify the class. *Id.*

The Martins reasserted their belief that the court lacked jurisdiction, and they requested an order dismissing their complaint with prejudice so they could immediately appeal the jurisdictional issue without expending further time and money in federal court. Noting that the Martins' dismissal request was motivated by their desire to take an immediate appeal and that defendants had failed to file a response, the district court granted a voluntary dismissal with prejudice.

On appeal, the Martins reassert their contention that the district court lacked subject matter jurisdiction over this action and therefore should have granted their motion to remand the case to state court. They contend that neither the complaint nor the notice of removal establishes by a preponderance of the evidence that the amount in controversy exceeds $50,000, and that the damages found by the district court reflect more than the amount claimed in their complaint. They also contend the court erred as a matter of law by failing to require each putative class member to independently meet the jurisdictional amount.

Defendants counter that the Martins waived their right to object to removal by failing to seek a remand within thirty

days, citing 28 U.S.C. § 1447(c). They also maintain the Martins' individual claims satisfied the jurisdictional amount. Finally, they contend the class' punitive damages could be aggregated and attributed to each class member to meet the jurisdictional amount and, in any event, any failure by putative class members to satisfy individually the jurisdictional amount was cured by the court's denial of class certification. We address each argument in turn.

II

Appellate Jurisdiction

We first address whether we have appellate jurisdiction. We raised the issue sua sponte, requesting the parties to address whether a voluntary dismissal with prejudice under these circumstances constitutes a final, appealable order for purposes of 28 U.S.C. § 1291. In assessing whether appellate jurisdiction exists in these circumstances, our inquiry is twofold: is the order granting the voluntary dismissal final; and is there a case or controversy in light of the fact that plaintiff sought the dismissal. After considering authority from other circuits and the purposes of the final order rule, we conclude that we have jurisdiction over this appeal.

First, we are convinced the dismissal with prejudice here is a final order for purposes of appeal. Nothing is left pending in the district court and, because the dismissal is with prejudice, the Martins are precluded from filing another lawsuit. The dismissal did not reserve the Martins' right to return to district court to litigate any remaining issues. If they lose on their appeal of the order denying remand, the litigation is terminated entirely. We agree with those authorities holding that a dismissal order is final under these circumstances. *See, e.g., Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999) (voluntary dismissal with prejudice final); *John's Insulation, Inc. v. L. Addison & Assoc.*, 156 F.3d 101, 107 (1st Cir. 1998) ("most circuits hold that voluntary dismissals, and

especially those with prejudice, are appealable final orders"); *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995) (judgment final when it bars claims forever); *see also* 15A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.8 (2d ed. 1992), at 623 (approving rule that holds judgment final when plaintiff who voluntarily dismisses abandons all remaining issues).

Viewing such a judgment as final does not undermine the final judgment rule by encouraging quasi-interlocutory appeals. "[I]f the plaintiff is unsuccessful in challenging the district court's action, then the dismissal operates as an adjudication on the merits and the litigation is terminated." *Concha*, 62 F.3d at 1507. Judicial economy is furthered because when "the appellant voluntarily dismisses his action with prejudice and loses on appeal, the district court is saved the time and effort of conducting extended trial proceedings and there is in addition no possibility of piecemeal appeals." *Id.* at 1508 n.8.

We also conclude that, even though the Martins requested dismissal, the appeal presents a case or controversy sufficient to support jurisdiction. Because the Martins were convinced the district court lacked diversity jurisdiction, they did not want to expend the resources necessary to proceed in federal court to a judgment on the merits, only to have the case remanded to state court on appeal for lack of jurisdiction. While such a dismissal may be technically voluntary, as a practical matter the Martins did not acquiesce in the judgment but rather were using dismissal to challenge the underlying ruling. When, as here, a plaintiff believes a ruling is so prejudicial to his case he is willing to risk losing the right to litigate completely in order to challenge it, a case or controversy exists and he should be allowed to appeal. *See John's Insulation*, 156 F.3d at 107 (voluntary dismissal with prejudice proper course of action when interlocutory ruling so

prejudicial that proceeding in district court would waste resources).

Because the Martins appealed a final order in a case or controversy, we have jurisdiction to address the appeal.

III

Diversity Jurisdiction

In their motion to remand, the Martins asserted a lack of federal diversity jurisdiction on the ground their action does not meet the $50,000 amount-incontroversy requirement imposed by 28 U.S.C. § 1332(a). We review de novo a district court's determination of the propriety of removal. *See Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072, 1076 (10th Cir. 1999). In assessing the district court's ruling, we bear in mind that "[t]he courts must rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states," *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1339 (10th Cir. 1998), and that the presumption is therefore "against removal jurisdiction," *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995).

A. The Burden of Establishing the Amount in Controversy.

When a case is originally brought in federal court, the plaintiff's claimed amount is presumed to support diversity jurisdiction. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). The same is not true, however, when the case has been removed from state court.

> In a removed case, unlike a case instituted in federal court, the plaintiff chose a state rather than federal forum. Because the plaintiff instituted the case in state court, "[t]here is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end."

Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997) (quoting *St. Paul Mercury*, 303 U.S. at 290);

see also Miera, 143 F.3d at 1340. Thus in a removed case, "[t]he defendant's claim that the amount in controversy exceeds $50,000 does not enjoy the *St. Paul Mercury* presumption of accuracy that the plaintiff's does." *Singer*, 116 F.3d at 376.

> Defendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when a plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

As the parties invoking the federal court's jurisdiction in this case, defendants bear the burden of establishing that the requirements for the exercise of diversity jurisdiction are present. *See Huffman*, 194 F.3d at 1079. We have held that "[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal." *Laughlin*, 50 F.3d at 873. In this case, the complaint itself does not specify the amount of damages requested. Indeed, defendants in their notice of removal observe that "[t]he amount in controversy, exclusive of interest and costs, cannot be determined from the face of the complaint." Aplt. App., doc. 4 at 2. When, as here, the plaintiff's damages are unspecified, courts generally require that a defendant establish the jurisdictional amount by a preponderance of the evidence. *See, e.g., St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Singer*, 116 F.3d at 376; *United Food & Commercial Workers Union, Local 919 v. CenterMark Prop. Meridan Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994); *Gafford v. General Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993); *Varella v. Wal-Mart Stores, East, Inc.*, 86 F. Supp.2d 1109, 1111 (D. N.M. 2000);

see also McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (party asserting jurisdiction must prove jurisdictional prerequisites by a preponderance of evidence).[2]

Although this court has not expressly adopted the preponderance standard in these circumstances, we have stated that the requisite amount in controversy "must be *affirmatively established* on the face of either the petition or the removal notice." *Laughlin*, 50 F.3d at 873 (emphasis added). The italicized language requires at a minimum that the jurisdictional amount be shown by a preponderance of the evidence. Because, as we discuss below, we conclude that defendants have failed to meet this burden, we need not decide whether a more stringent one should be applied.

B. Determination of Amount in Controversy

We turn to a de novo review of the district court's conclusion that diversity jurisdiction is present here.[3] The complaint

[2] A few courts have placed greater or lesser burdens on defendants asserting removal jurisdiction based on diversity. *See generally* 14C CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3275 (3d ed. 1998), at 89-95 (discussing standards).

[3] We give short shrift to defendants' argument that the Martins waived federal diversity jurisdiction by failing to challenge the amount in controversy within thirty days. The governing statute expressly provides to the contrary: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). As the Supreme Court has noted:

> section [1447(c)] differentiates between removals that are defective because of lack of subject-matter jurisdiction and removals that are defective for some other reason . . . . For the latter kind of case, there must be a motion to remand filed no later than 30 days after the filing of the removal notice. For the former kind of case, remand may take place without such a motion and at any time.

Wisconsin Dep't of Corr. v. Schacht, 524 U.S. 381, 392 (1998) (citations omitted). In *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995), for example, we raised the issue of diversity jurisdiction on appeal and concluded it was lacking, even though the plaintiff "neither objected to removal nor questioned the amount in controversy." *Id.*

does not in any of its counts request a specific dollar amount. Nonetheless, the district court adopted defendants' construction of the Martins' pleading and concluded that the complaint itself established the requisite amount in controversy.[4] We have carefully reviewed the complaint and we agree with the Martins that it does not demonstrate by a preponderance of the evidence claims in excess of $50,000. For example, it appears defendants simply viewed every dollar amount mentioned in the complaint as an item of damages claimed by the Martins without regard to allegations making clear the Martins were not in fact seeking all those amounts.[5] In

[4] We have held that a defendant's economic analysis of the plaintiff's claims for damages, "prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. . . . [T]he requisite amount in controversy . . . must be affirmatively established on the face of either the petition or the removal notice." *Laughlin*, 50 F.3d at 873. At the hearing below, the district court recited and adopted the amounts set out by defendants' briefs in support of jurisdiction. *See* Aplt. App., doc. 20 at 46. The record on appeal does not include these briefs and it is arguable, given our holding in *Laughlin*, that they should not have been considered by the district court. We need not decide whether the court erred in this regard, however, in view of our conclusion that the Martins' complaint does not support the construction defendants placed upon it in those briefs.

[5] Defendants apparently included in their calculation finance charges of over $8000 and insurance premiums of over $7000 despite allegations in the complaint that because the Martins defaulted on their installment contract, they made only a few payments on the finance charges and no payments on the insurance premiums, and sought to recover only the charges they actually paid. Defendants included two repossession charges as items of damages although the Martins did not allege that the first of these, in the amount of $420, was illegal. Defendants likewise included a down payment of almost $4000 which the Martins were not attempting to recover. On appeal, defendants also argue that the entire amount of the sales contract is to be included, notwithstanding that the Martins, while

addition, while the Martins did seek treble damages under one state statute, defendants have failed to establish what specific damages were recoverable under that statute and instead merely assumed that all amounts mentioned in the complaint were subject to trebling.

Because we conclude that the amount-in-controversy requirement is not satisfied on the face of the complaint, we turn to the notice of removal. As mentioned above, defendants conceded in their removal notice that the amount in controversy could not be determined from the face of the complaint. Aplt. App., doc. 4 at 2. In contending that the requisite amount was nonetheless satisfied, defendants began by summarizing the allegations and the requested relief asserted by the Martins. This mere summary, of course, does not provide the requisite facts lacking in the complaint. Defendants also asserted that jurisdiction was satisfied because the attorneys fees and the punitive damages claimed by the entire class could be aggregated and attributed to the Martins in determining the amount in controversy, and that so long as the Martins as class representatives met the jurisdictional amount, the other class members fell within the court's supplemental jurisdiction regardless of the value of their claims. As we discuss below, none of these assertions supports the existence of diversity jurisdiction.

1. Aggregation of Punitive Damages

We turn first to defendants' contention, both in their removal notice and on appeal, that the punitive damage claims of the putative class members may be aggregated and attributed to the Martins and to each class member, and that these aggregated damages satisfy the jurisdictional amount with respect to each member of the putative class. In support of this argument, defendants rely on the cases of *Tapscott v. MS*

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seeking rescission of the contract, sought as damages only the amounts they had actually paid under it.

Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996), and *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), both of which have been disapproved by the circuits that decided them. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (explaining *Tapscott* not valid precedent because it conflicts with earlier ruling on same issue); *Ard v. Transcont'l Pipe Line Corp.*, 138 F.3d 596, 601-02 (5th Cir. 1998) (*Allen* decision due to peculiarity of Mississippi law and does not represent precedent for any other state). Indeed, all of the circuits considering the issue now hold that punitive damages cannot be aggregated and attributed in total to each member of a putative class for purposes of satisfying the amount-in-controversy requirement of diversity jurisdiction. *See, e.g., Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1264-65 (11th Cir. 2000); *Ard*, 138 F.3d at 600-02; *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997); *see also Anthony v. Security Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996) (implicitly rejecting aggregation of punitive damages by concluding that "[t]he plaintiffs in this case would have to recover on average at least $47,118.36 in punitive damages to satisfy 28 U.S.C. § 1332").

Although this court has not ruled directly on the matter, we have pointed out that the Supreme Court has historically interpreted section 1332 "to require plaintiffs who have separate and distinct claims, but unite together in a single suit, to each meet the jurisdictional amount in controversy." *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 (10th Cir. 1998). We observed that the Court has therefore only permitted aggregation when "a single plaintiff seeks to aggregate . . . his own claims," or when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* As we discuss below, we now hold, in light of the language in *Leonhardt* and the analysis of our sister circuits, that punitive damages may not ordinarily be aggregated and attributed in total to each member of a putative class for purposes of satisfying diversity jurisdiction.

The court in *Gilman* explained the reasoning supporting this conclusion.

> As one court expressed the principle, the "paradigm cases" allowing aggregation of claims "are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res."

Gilman, 104 F.3d at 1423 (quoting *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D. N.J. 1996)). The court pointed out that even though a class claim for punitive damages may create a single pool of recovery, "a common interest in a pool of funds is not the type of interest that permits aggregation of claims under the `common fund' doctrine." *Id.* at 1430. Each class member could sue separately for punitive damages and have his right to recovery determined without implicating the rights of every other person claiming such damages. *Id.* Because a class member's right to punitive damages is separate, distinct, and independent from those of other class members, the class claim for such damages does not seek to enforce a single right in which the class has a common and undivided interest. Punitive damages therefore may not be aggregated in a class action and attributed in total to each member of the class. We agree with *Gilman* and the other courts, and we reject defendants' argument that the jurisdictional amount with respect to the Martins is satisfied on the basis of the aggregated claims of the class members to punitive damages.

2. Aggregation of Attorney Fees

In their removal notice, defendants also assert that "[t]he attorney fees of the entire class are attributable to the named plaintiffs for purposes of satisfying the jurisdictional amount." Aplt. App., doc 4 at 3. Although defendants do not present

this argument directly on appeal, they contend that all of the fees requested by the Martins should be considered in determining whether their claims satisfy the amount in controversy, in effect attributing all the fees that will potentially be recovered in this putative class action to the class representatives.

Courts have generally held, under the same rationale applied to preclude the aggregation of punitive damages, that attorneys fees cannot be aggregated for purposes of diversity jurisdiction. *See, e.g., Morrison*, 228 F.3d at 1266-68 (when each class member could recover attorneys fees if he sued separately, right to recover fees was separate and distinct and could not be aggregated); *see also Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (aggregation of attorneys fees would conflict with Supreme Court authority requiring plaintiffs with separate and distinct claims to each meet jurisdictional amount).[6] We agree and conclude that potential attorneys fees requested on behalf of the class may not be aggregated and attributed entirely to the Martins in assessing whether they meet the amount in controversy.[7]

In view of our conclusions that neither the face of the complaint nor the removal notice demonstrate that the Martins'

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[6] In their removal notice, defendants cited *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995), as support for their contention that attorneys fees can be aggregated. As the Fifth Circuit has observed, however, the holding in *Abbott Laboratories* is peculiar to a Louisiana statute and "[t]he standard approach to awards of attorney fees in a class action context is to distribute them pro rata to all class members, both named and unnamed." *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.5 (5th Cir. 2001).

[7] The result might be different if the state statute under which fees are sought expressly awards those fees solely to the class representatives. *See, e.g., H & D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 330-31 (5th Cir. 2000). Defendants have made no showing that the statutes at issue in this case do so.

claims will exceed $50,000, and that neither the punitive damages nor the attorneys fees sought by the class can be attributed entirely to the Martins as class representatives, we hold defendants have failed to show by a preponderance of the evidence that the Martins' claims meet the amount in controversy necessary to the exercise of diversity jurisdiction.[8]

Because the Martins' claims do not meet the jurisdictional amount, the disposition of the class claims by the district court is irrelevant. Although we therefore need not address the remaining arguments with respect to the class, we make the following observations. This court has specifically rejected defendants' contention that so long as the class representatives meet the jurisdictional amount, all class members fall within the court's supplemental jurisdiction. *See Leonhardt*, 160 F.3d at 638-41 (rejecting argument that "the enactment of 28 U.S.C. § 1367, concerning supplemental jurisdiction, altered the historical aggregation rules under § 1332 for class actions," and concluding enactment of § 1367 did not overrule preexisting authority holding "each plaintiff in a diversity-based class action must meet the jurisdictional

[8] We reject the argument based on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), that diversity jurisdiction exists nonetheless because the district court refused to certify the class and the resulting deletion of the putative class members cured any jurisdictional defect their presence might earlier have created. Although the Supreme Court held in *Caterpillar* that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered," *id.* at 64, the Court also observed that "if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated," *id.* at 76-77 (italics deleted). Because defendants failed to establish that diversity jurisdiction is present with respect to the Martins, the jurisdictional defect remained at the time of judgment. *See Gilman*, 104 F.3d at 1421 (when removing defendant fails to establish subject matter jurisdiction by the time judgment is entered, judgment must be vacated and remanded with instructions to remand to state court).

amount in controversy under § 1332").[9] In any event, because the class representatives here do not meet the jurisdictional amount, supplemental jurisdiction over class members would not be available.[10]

In sum, we hold that we have appellate jurisdiction over this final, appealable order. Defendants have failed to establish the requisite amount in controversy, and the district court therefore lacked subject matter jurisdiction.

Accordingly, we REVERSE the judgment of the district court and REMAND with directions to remand this action to state court.

[9] In *Abbott Laboratories*, 51 F.3d 524, the Fifth Circuit reached a result directly contrary to our holding in *Leonhardt*. The Supreme Court granted certiorari in *Abbott Laboratories* to address whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overruled the authority upon which this court relied in *Leonhardt*, *see Free v. Abbott Labs., Inc.*, 528 U.S. 1018 (2000), and affirmed the Fifth Circuit's decision by an equally divided Court, *see Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000) (per curiam). An unexplained affirmance by an equally divided court is not entitled to any precedential weight. *See Rutledge v. United States*, 517 U.S. 292, 304 (1996). *Leonhardt* accordingly remains controlling law in this circuit.

[10] The only allegations in the complaint relevant to the putative class members are assertions that their individual damages "are too small in number to justify the expense and effort required to bring suit separately," Aplt. App., doc. 2 at 14, and that the "Martins claims are not only typical but identical to the claims of the members of the Class," *id.* at 16. These allegations do not establish individual claims in excess of $50,000, particularly given our holding that neither attorneys fees nor punitive damages may be aggregated and attributed in total to each class member. Accordingly, we conclude that defendants have failed to establish the amount in controversy with respect to any of the putative class members.

(5)

No. 04-1140

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

What legal standard governs the decision whether to award fees and expenses under 28 U.S.C. § 1447(c) upon remanding a removed case to state court?

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IN THE

Supreme Court of the United States

No. 04-1140

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, *Martin v. Franklin Capital*, 393 F.3d 1143 (10th Cir. 2004) ("*Martin II*"), is reproduced in the Appendix to the Petition ("Pet. App."), 1a-13a. The "memorandum opinion and order" of the U.S. District Court for the District of New Mexico is unreported and is reproduced in Pet. App. 14a-21a. A published opinion of the U.S. Court of Appeals in a relevant prior appeal, *Martin v. Franklin Capital*, 251 F.3d 1284 (10th Cir. 2001) ("*Martin I*"), is reproduced in the Joint Appendix ("JA"), 51-65.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on December 30, 2004. The Petition was filed on February 23, 2005, and granted on April 25, 2005.

STATUTE INVOLVED

28 U.S.C. § 1447(c) provides:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Prior to its amendment in 1988, Section 1447(c) had read:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT OF THE CASE

This is a consumer class action arising under state law, filed in New Mexico state court. Plaintiffs Gerald T. and Juana M. Martiñ, who are Petitioners here, sued on behalf of themselves and others similarly situated, seeking "damages under state statutory and common law theories for alleged illegalities with respect to automobile financing and insurance contracts they had entered into with defendants." (Pet. App. 2a, *Martin II*, 393 F.3d at 1146). Defendant Century-National Insurance Company, with the consent and concurrence of defendant Franklin Capital Corporation, removed the case to U.S. District Court for the District of New Mexico, on the basis of diversity jurisdiction. (JA 34-37).

After some pretrial litigation, there was argument on Century-National's motion to dismiss. At that argument, counsel for the Martins raised the issue of lack of subject-matter jurisdiction. (JA 38). The District Court stated that it had spotted an issue as to whether the requisite amount in controversy had been shown, was "concerned" about it and was "wondering" about it, but had not made the effort to "ma[ke] any analysis" of it. (*Id.*). Indeed, the Court made clear that its failure to analyze the issue was no oversight: "If you [Martin's counsel] want that brought to the Court's attention, it's your obligation to do so." (*Id.*) *Compare Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (reaffirming the long-standing principle that "subject-matter delineations must be policed by the courts on their own initiative even at the highest level."). The Court opined that a motion to remand might be untimely (*compare* 28 U.S.C. § 1447(c) (making clear that there is no time limit on a motion to remand based on lack of subject-matter jurisdiction)) but told the Martins' counsel that he could file such a motion if he wished. (JA 38). Counsel indicated that he would do so. (JA 40).

The Martins then moved to remand for lack of jurisdiction, because the amount in controversy did not meet the statutory minimum under 28 U.S.C. § 1332. (*See* Pet. App. 2a, *Martin II*, 393 F.3d at 1146). Opposing that motion, Defendants "argued variously [that] the amount in controversy was satisfied because the Martins' complaint sought punitive damages of more than $50,000 in the aggregate [as to all members of the putative class]; sought attorney's fees of

more than $50,000 in the aggregate [again as to all members of the putative class]; and sought monetary relief for the named plaintiffs for more than $50,000." (Pet. App. 2a-3a, 393 F.3d at 1146).

The District Court denied the motion to remand, and further denied the Martins' request to certify that order for immediate appeal. (JA 44-50). In the latter ruling, the District Court opined that the decision whether to remand (where, as here, the motion to remand is based on lack of subject-matter jurisdiction) is a "highly discretionary decision." (JA 45). *Compare* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (emphasis supplied). Plaintiffs asked the District Court to enter judgment against them so that they could seek review of the denial of their motion to remand. The District Court did so, and Plaintiffs appealed. (Pet. App. 3a, *Martin II*, 393 F.3d at 1146).

The U.S. Court of Appeals for the Tenth Circuit held, on that appeal, that the case was not removable because the amount-in-controversy requirement for diversity jurisdiction was not met. *Martin I*, 251 F.3d 1284 (10th Cir. 2001), JA 51-65. The Court of Appeals noted that the burden of proof was on the removing defendants to establish that the amount in controversy was sufficient. *Id.*, 251 F.3d at 1290, JA 57. The Court held first that defendants had failed to demonstrate that the claims of the Martins, considered individually, exceeded the statutory minimum for diversity jurisdiction. *Id.*, 251 F.3d at 1291, JA 59-60. The Court then turned to the class-related legal contentions on which defendants relied: the contention that either punitive damages, or attorneys' fees, could be aggregated among all members of the putative class so as to meet the amount-in-controversy requirement. As to the aggregation of punitive damages, at the time of the removal there had been some short-lived (and later-overruled)

out-of-Circuit authority that supported defendant's argument. Defendants had been trying to make new law to that effect in the Tenth Circuit, but the Court rejected their argument; it held that punitive damages could not be aggregated among class members. *Id.*, 251 F.3d at 1293, JA 60-62. The Court further rejected defendants' attempt to make new law allowing the aggregation of attorneys' fees so as to meet the amount-in-controversy requirement. *Id.*, 251 F.3d at 1293, JA 63.

The case returned to the District Court with instructions that it remand the case to state court. The District Court did so, and so more than three and a half years after the Martins had raised the jurisdictional issue, the case returned to the state court from which it had been improperly removed.

Plaintiffs then moved, under 28 U.S.C. § 1447(c), for an award of fees and expenses. The District Court denied that motion, explaining its reasoning in the "Memorandum Opinion and Order" that appears at Pet. App. 14a-21a. The District Court indicated that the removal, insofar as it had been based on the attempt to aggregate punitive damages, had not been "improper" at the time it was done, because there was out-of-Circuit authority that supported it and no Tenth Circuit authority rejecting it. (Pet. App. 17a-19a). As to the attempt to aggregate attorney's fees as a basis for the removal, the District Court indicated that the caselaw on which the Tenth Circuit relied in rejecting that theory had been "primarily" decided after the removal in this case. The District Court further stated that its analysis of the punitive damages issue was applicable to the attorney's fee issue as well. (Pet. App. 19a). The District Court recognized that the Tenth Circuit had held the removal to have been "improper" (Pet. App. 20a), but stated that this did not compel an award of fees. The District Court then denied the motion, stating "I conclude that in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's

jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area, as discussed above." (Pet. App. 20a).

Plaintiffs appealed the denial of fees and expenses. In the decision presently under review, which is contained in Pet. App. 1a-13a, the Tenth Circuit affirmed the decision as having been within the District Court's discretion. The Court stated, "Given our decision in *Martin I* that removal was improper in this case, the District Court had discretion to award attorney's fees to the Martins if it believed fees were appropriate. The district court determined defendants possessed objectively reasonable grounds to believe removal was proper and therefore declined to award fees to the Martins. We review that decision for abuse of discretion." *Martin II*, 393 F.3d at 1146, Pet. App. 4a. The Court of Appeals held, "While a close question, we agree with the district court that at the time defendants removed this action to federal court on the basis of aggregating punitive damages, they 'had objectively reasonable grounds to believe the removal was legally proper.'" *Id.*, 393 F.3d at 1148, Pet. App. 7a-8a. Having so concluded, the Court of Appeals found it unnecessary to "address defendants' remaining positions supporting removal." *Id.*, 393 F.3d at 1148 n.4, Pet. App. 8a. Like the District Court, the Court of Appeals based this conclusion on the fact that there had been, at the time of removal, some out-of-Circuit authority supporting the theory. *Id.*, 393 F.3d at 1148-50, Pet. App. 8a-11a. The Court of Appeals thus concluded that, based on the existence of "objectively reasonable grounds to believe the removal was legally proper," and given the "uncertain state of the law on aggregation of punitive damages when defendants removed this action," the District Court did not abuse its discretion in refusing to award fees under Section 1447(c). *Id.*, 393 F.3d at 1151, Pet. App. 13a.

SUMMARY OF THE ARGUMENT

The fee-shifting provision of Section 1447(c) says that a District Court "may" award fees and expenses upon remanding a case to state court. But the discretion embodied in "may" is limited by a governing legal standard. This Court has found governing legal standards in other fee-shifting statutes that (like this one) use "may" without any explicit standard. The Court has found the standard, for each type of case, through an examination of the law's "large objectives" and "equitable considerations." *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 758-59 (1989).

Under that sort of analysis, the proper interpretation of "may" in Section 1447(c) is that a District Court should award fees to a plaintiff who has successfully sought remand, unless there are exceptional circumstances that would make such an award unjust. This would be very similar to the standard identified in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). Or, at least, the standard should consist of a presumption in favor of a fee award for a plaintiff who has successfully sought remand. As a corollary, the fact that the removing defendant had a plausible or reasonable argument in favor of removal is not a proper basis for denying an award of fees.

A *Piggie Park*-like standard will further the large objectives at stake in the law of removal and remand. It will reduce docket congestion in federal courts, which was a major concern underlying the Act that added the fee-shifting provision to Section 1447(c). It will assist in maintaining the proper relationship and comity between state and federal courts. It will reduce the wasted resources that come from litigation about questions of jurisdiction, and will promote the public interest in clarity in jurisdictional rules.

Fee-shifting standards different from the *Piggie Park* standard are appropriate in contexts where there is a public

interest in preserving litigants' incentive to creatively and zealously advocate even when their positions may be incorrect. But there is no public interest or even any legitimate private interest that is served by a removal of questionable validity. To the contrary, public and private interests suffer from such removals. And, indeed, the detrimental effects of an incorrect removal are most pronounced in those cases where the defendant had a reasonable argument in favor of the removal; the close cases cause the most disruption and waste of resources. So, a standard that exempted those cases from fee awards would give exactly the wrong incentives.

The standard that we propose is also most consistent with the statutory text, considered in light of the legal landscape at the time of its enactment. The deletion of some language from the prior text of Section 1447(c), the one-way nature of the fee-shifting provision, and other aspects of the text confirm that an award of fees should not be reserved for only the most patently incorrect removals. Furthermore, the standard should be a rule rather than a balancing of some set of factors. A rule-based standard is what Congress would have been anticipating at the time of enactment. A rule-based standard would have the best chance of influencing litigation behavior, and would reduce uncertainty.

Once it is realized that the existence of a reasonable (or even almost-good-enough) argument in favor of removal is not a proper basis for denying fees under Section 1447(c), a fee award is the only reasonable result in this case. Neither the lower courts, nor the defendants, have offered any valid reason to justify a denial of fees and expenses.

ARGUMENT

I. INTRODUCTION: IDENTIFICATION OF A FEE-SHIFTING STANDARD SETS THE INCENTIVES ON BOTH SIDES OF THE CLASS OF LITIGATION INVOLVED.

Fee-shifting statutes, this one included, create incentives. They deter one side from engaging in behavior that will give rise to a fee award, and they encourage the other side to challenge such behavior. Fee-shifting statutes commonly harness these incentives, in order to further the substantive goals of the law. Relatedly, fee-shifting statutes further the goal that the cost of certain types of behavior will fall where it equitably should. *See, e.g., Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 758-59 (1989). As Professor Pamela Karlan has put it,

> Fee shifting has become an increasingly prevalent feature of the American civil litigation system. Two standard justifications for fee shifting center on influencing attorney behavior. First, the idea of the "private attorney general" recognizes that certain important rights will be underenforced unless lawyers are given an economic incentive to litigate. Second, concern with attorney misbehavior has led to fee awards that compensate the innocent party for expenses he has incurred as a result of an opponent's culpable conduct. In addition to these behavior-centered reasons, another justification for fee shifting focuses on the rights of injured parties and the need for make-whole relief: if the cost of enforcing his rights is left to lie on an injured person, then an award equal to the damages he suffered will provide only a partial remedy.

Karlan, Symposium on Fee Shifting: Fee Shifting in Criminal Cases, 71 Chi-Kent L. Rev. 583, 589-90 (1995) (footnotes omitted).

The question here is what legal standard governs the decision whether to award fees and expenses under Section 1447(c). Identification of a legal standard sets the level of incentives on each side, in a manner designed to best promote the substantive goals of the law. If the goal is the simple one of deterring certain behavior by one side and encouraging the other side to challenge it, the standard that most neatly fits the bill is that the challenging party, if successful, *should* be awarded fees (except perhaps in exceptional circumstances). So, that standard has been adopted in cases such as *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) (applying this standard to the decision whether to award fees to a successful plaintiff under Title II of the Civil Rights Act of 1964). If the goal is instead to deter a party from only some particularly bad sort of litigation behavior, but at the same time to protect that party's incentive to litigate arguably valid contentions aggressively and creatively without undue concern about added adverse financial consequences in the event of a loss, then a different legal standard is chosen. One standard that meets this set of goals is the allowance of a fee award only if the losing party's position was frivolous, unreasonable or without foundation. *See, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (applying this standard to the decision whether to award fees against an unsuccessful plaintiff under Title VII). Finally, if the goal is something more complex, nuanced, and variable than either of those, then sometimes still another legal standard amounting to a balancing of factors may be appropriate. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

Sometimes Congress makes an explicit choice as to the standard. But often it does not, and it did not in Section

1447(c). In these instances, the question of when fees should be awarded becomes one for judicial resolution.[1]

II. WHEN CONGRESS ENACTED THE FEE-SHIFTING PROVISION OF SECTION 1447(C), IT WAS DEEPLY CONCERNED WITH DOCKET CONGESTION IN THE FEDERAL COURTS.

When enacting the Judicial Improvements and Access to Justice Act of 1988, P.L. 100-702, the Congress was, to its credit, intensely concerned with the burdens on the federal judiciary and the overcrowding of dockets in federal courts. *See* H.R. REP. 100-889, 1988 U.S.C.C.A.N. 5982, 5983 (referring to Congress's concern, reaching back more than a decade, that the federal courts were "overloaded with cases," and noting that despite intervening actions "much remains to be done"); *id.* at 5984 (referring to Congress's concern with "pressures placed on judges who must cope with the torrent of litigation," and noting that "in order to maintain pace with societal and technological changes that are translated into constant and growing judicial workloads, more needs to be done."). Other references to the judicial workload and burdens appear throughout that House Report. *See also Tank v. Chorister*, 160 F.3d 597, 599 (10th Cir. 1998) ("The purpose of the Act was to reduce substantially the diversity jurisdiction of the federal courts."). The Act therefore included various provisions that would alleviate docket congestion in federal courts. These included a five-fold increase in the amount-in-controversy requirement for diversity cases (Section 201), a new restriction on the right of removal (Section 1016(b)(2)(B)), a program to foster arbitration (Section 901 *et seq.*), and the creation of a Federal

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[1] This Brief will often refer to "fees," rather than "fees and expenses." Unless otherwise apparent from the context, this is simply for the sake of brevity. It never constitutes abandonment of the request for expenses.

Courts Study Committee to delve further into these and related issues (Section 101 *et seq.*).

The Act also revised the procedure for removing cases from state court. Removal had until then been accomplished by a "petition," but Section 1016 of the Act substituted the mechanism of "notice." This aspect of the Act, like others, reflected the Congressional concern with overcrowded federal-court dockets: Section 1016(b) of the Act, codified at 28 U.S.C. § 1446, specifically pointed out that a notice of removal (like all other pleadings and papers) would be subject to Fed. R. Civ. P. 11. In this way, Congress underscored—perhaps unnecessarily, as Rule 11 would have applied even without that reference, but nonetheless as an unmistakable sign of legislative concern about inappropriate removals—that frivolous removals could lead to awards of attorneys' fees or other sanctions.

But even this notable and rare statutory reference to Rule 11 was not enough to reflect the full extent of Congress's concern with wrongful removals and with remedies for them. Beyond that, Congress added something that had not previously been part of the removal statutes: a provision allowing District Courts to award attorney fees when remanding a case. This was Section 1016(c)(1) of the Act, amending 28 U.S.C. § 1447(c).

III. THERE IS A STANDARD AS TO WHEN FEES SHOULD BE AWARDED, AND IT IS TO BE FOUND THROUGH EXAMINATION OF THE LAW'S "LARGE OBJECTIVES" AND OF THE RELEVANT "EQUITABLE CONSIDERATIONS."

The first step towards answering the question presented is to recognize that there is an answer. Though Section 1447(c) says that a District Court "may" award fees, that does not mean that each District Judge may do whatever he or she pleases. Instead "may" incorporates a legal standard that is to

be identified by this Court. As this Court said in interpreting "may" in another fee-shifting statute, "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989).

Those limits are to be found "in the large objectives of the relevant Act, which embrace certain equitable considerations." *Id.*, 491 U.S. at 758-59 (citations and internal quotation marks omitted). Those things guide the Court in interpreting the statutory text. Using this method, this Court has often arrived at categorical rules, under which in some contexts "may" means "should, except in exceptional circumstances," and in other contexts means "must not, except in cases of litigation conduct that was frivolous, unreasonable or without foundation." *See Piggie Park*, 390 U.S. at 402 (successful plaintiff under Title II of Civil Rights Act of 1964 should ordinarily receive an award unless special circumstances would render such an award unjust); *Northcross v. Bd. of Ed. of Memphis City Schools*, 412 U.S. 427 (1973) (applying *Piggie Park* standard to decision whether to award fees to a successful plaintiff in litigation under Section 718 of the Emergency School Aid Act of 1972); *Christiansburg Garment*, 434 U.S. at 421 (fees can be awarded against unsuccessful plaintiff in Title VII case only if the case was "frivolous, unreasonable or without foundation"); *id.* at 417 (holding that, on the other hand, the *Piggie Park* standard applies to awards to successful plaintiffs under Title VII); *Zipes*, *supra* (applying the stringent *Christiansburg Garment* standard to decision whether to award fees to a plaintiff against an unsuccessful intervenor in Title VII case).

Congress, in turn, has come to rely on this Court's willingness and ability to perform that sort of analysis. When enacting the current version of Section 1447(c) in 1988, Congress could trust that the word "may" would receive the

same sort of analysis that the word had received in prior cases. Congress was on notice that if it used similar language from one fee-shifting statute to the next, this Court would interpret that language similarly. *Northcross*, 412 U.S. at 428; *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (holding that the phrase "prevailing party" would be taken to mean the same thing in every fee-shifting statute where it appeared); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691-92 (1983) (same, as to the word "appropriate" as used in several statutes). Knowing that, in Section 1447(c) Congress used the same word "may" that this Court had interpreted categorically in other fee-shifting statutes. There is no reason to believe that Congress, when enacting P.L. 100-702 and knowing of the pre-1988 decisions cited above, intended in this instance (unlike all others) that the word "may" would be interpreted as a standardless grant of discretion to the District Courts. There is no reason to believe that the Congress expected that as to this statute alone, this Court would interpret "may" as meaning that each District Court could choose at its pleasure among the *Piggie Park* standard, the *Christiansburg Garment* standard, or some other standard.

So, the Tenth Circuit (whose decision is under review) has erred by adopting a view of Section 1447(c) that incorporates no true standard at all. That Circuit allows District Courts to use a standard that is the same as or at least quite close to the *Christiansburg Garment* rule, as the District Court did here. When a District Court chooses that standard, the Circuit will affirm (as it did here) after concluding *only* that the defendant's removal, though legally incorrect, was still not without a reasonable basis. *Martin v. Franklin Capital*, 393 F.3d at 1147 (Pet. App. 6a-7a); *id.* at 1151 (Pet. App. 13a). Nothing more than that is required, and so there is nothing to stop a District Judge from declining to award fees whenever the removal, though incorrect, had some reasonable argument in support. But the same Circuit also allows a District Court to use a different standard, even the *Piggie Park* standard.

This is demonstrated by the fact that, when reviewing a District Court's decision to award fees, the Circuit inquires *only* whether the District Court was correct in holding the case to be non-removable. Again, nothing more than that is required, and so there is nothing to stop a District Judge from routinely awarding fees every time he or she remands a case. *Topeka Housing Authority v. Johnson*, 404 F.3d 1245 (10th Cir. 2005). This amounts to no standard at all; and a no-standard interpretation of the word "may" conflicts with *Zipes*.

IV. THE CORRECT STANDARD IS THE *PIGGIE PARK* RULE, OR A VERY STRONG PRESUMPTION IN FAVOR OF A FEE AWARD FOR A PLAINTIFF WHO SUCCESSFULLY SEEKS REMAND.

Having shown that there is a correct standard, what remains is to show that the District Court used the wrong one (and so the Court of Appeals erred in affirming). The District Court's denial of fees was based on its conclusion that "Defendants had objectively reasonable grounds to believe the removal was legally proper." (Pet. App. 20a). The Circuit Court's affirmance was based on that same characterization, and on the holding that the District Court therefore acted within its discretion in denying fees. (Pet. App. 13a). It should go without saying that, in general, lawyers in civil litigation simply ought not be taking positions that lack an objectively reasonable basis; and so if that is the standard for fee awards, then fees are to be awarded only when the removal was extremely inappropriate indeed. However, the District Court was not alone in adopting this standard. The Fifth Circuit, for example, utilizes the same standard: "Fees should only be awarded if the removing defendant lacked 'objectively reasonable grounds to believe the removal was legally proper.'" *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004).

That standard is quite similar to the *Christiansburg Garment* standard, which bars a fee award against an unsuccessful civil rights plaintiff in all but the very bad cases. The *Christiansburg Garment* standard is "frivolous, unreasonable, or without foundation." 434 U.S. at 421. "Frivolous" and "without foundation" are, if anything, even worse than "unreasonable" in day-to-day legal parlance. To the extent that the three adjectives or phrases are not synonyms, then, "unreasonable" is ultimately the dividing line as to when fees can be awarded under *Christiansburg Garment*; and unreasonableness is also the touchstone in the Fifth Circuit's test, and in the test that the District Court used here. If there is any difference between these tests in practical application, the difference is quite narrow and hard to pin down.

But that is not the proper standard under Section 1447(c). The proper standard is the *Piggie Park* rule, or a very strong presumption in favor of a fee award. A plaintiff that successfully seeks remand should receive an award of fees and expenses unless special circumstances would render such an award unjust. At the least, as the Seventh Circuit has held, there is a presumption in favor of an award when a case is remanded. *See, e.g., Hart v. Wal-Mart Stores*, 360 F.3d 674, 678 (7th Cir. 2004). As a corollary, it should be made explicit that the existence of a reasonable but losing argument in favor of the removal (or even a losing argument that was better than merely "reasonable") is *not* a special circumstance that would justify an exception to the *Piggie Park* rule. Likewise, if the Seventh Circuit's "presumption" formulation is adopted, it should be made clear that the existence of such an argument is *not* a countervailing factor that would overcome the presumption. These clarifications are necessary because without them we would all simply find ourselves with the same problems once again: either the standard would differ from one courtroom to the next, or the *Christiansburg Garment* standard would prevail in all but name.

A. The relevant "large objectives" and "equitable considerations" call out for the *Piggie Park* rule.

The search for the proper standard begins with the roadmap in *Zipes*: the standard is to be found through examination of "the large objectives of the relevant Act, which embrace certain equitable considerations." *Zipes*, 491 U.S. at 759 (citations and internal quotation marks omitted). The "relevant Act" in this sense, could be understood as meaning either P.L. 100-702, or the greater body of law regarding removal and remand, or (best yet) both of those. The Act in which this fee-shifting provision was contained is relevant because it sheds light on the concerns that were immediate to the Congress at the time; and the greater body of law on the topic is also relevant, because it embodies the relevant public and private interests that are at stake. So, we turn to identifying the large objectives and equitable considerations.

When this Court has read "may" to mean something other than the *Piggie Park* rule, it has been in litigation contexts where there was some reason why the class of litigants subject to a fee award should be encouraged to litigate even though they might lose. This Court has read "may" to mean the *Christiansburg Garment* standard, or another standard other than a strong presumption in favor of fees for the winning party, in contexts where there was an affirmative public benefit derived from a party's willingness to zealously litigate the tough questions and hard cases. The bar for a fee award against such a party was set higher than merely losing the case, at least in part so as not to deter such a party from litigating aggressively but reasonably on a debatable point. This sort of reasoning appears repeatedly in this Court's caselaw. *Christiansburg Garment*, 434 U.S. at 422 ("To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would

undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."); *Zipes*, 491 U.S. at 763-65 (applying *Christiansburg Garment* standard to bar fee awards against intervenors in Title VII cases, in part because their participation in cases was "particularly welcome" and because a lower standard for fee awards would cause them to bring separate litigation to collaterally attack a decree instead of intervening, which would be to the detriment of all persons involved); *Fogerty*, 510 U.S. at 526-27 (1994) (discussing the fact that the public derives a benefit from successful *defense* of copyright litigation, as well as from the successful *pursuit* of such litigation).

There is no interest of that sort in the removal and remand context. There is no public benefit that comes from a defendant's willingness to aggressively remove cases when the propriety of removal is questionable or worse. To the contrary, such litigation behavior is detrimental to the public interest. That is the first reason why a standard like *Piggie Park*, and not a standard like *Christiansburg Garment*, ought to apply here.

The "large objectives" and "equitable considerations" at stake in the context of removal and remand include three related goals. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests."). First is the preservation and pursuit of *comity* between state courts and federal courts, as well as the proper balance between federal and state control. An incorrect removal of a case that should have been left in state court is detrimental to this objective. *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 109 (1941) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."), *citing Healy v. Ratta*, 292 U.S. 263, 270 (1934); *University of South Alabama v. American Tobacco Company*, 168 F.3d 405, 411 (11th Cir. 1999) ("[R]emoval jurisdiction raises significant federalism concerns ... [I]f a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.").

Second is the avoidance of further burdens on the already-too-burdened federal judiciary. As we have pointed out above, this was a major concern for Congress when enacting P.L. 100-702, which included this fee-shifting provision. An incorrect removal of a case does harm in this regard as well. And, notably, the burden on the federal courts is *greater* from a removal that presents a close question than from one that is not even supported by a reasonable argument. Thus a *Christiansburg Garment*-like rule is a perverse incentive in the removal context: it fails to deter precisely those actions that cause the most harm. A removal that is not even supported by a reasonable argument can be dealt with swiftly, often by the District Court *sua sponte*; and the removals that are completely unreasonable can, in any event, be caught and disposed of quickly enough to avoid significant litigation on the merits in federal court prior to a remand. An incorrect removal that presents a close question, by contrast, makes more work for the federal bench: more work in spotting the jurisdictional issue if the plaintiff does not immediately do so, more work in deciding whether the removal was appropriate, and (if the reasonably-debatable removal is incorrectly upheld by a District Judge, as it was in this case) there can be the disastrous consequence that the District Court sees the case through to final judgment, only to have that judgment voided on appeal and the case remanded to state court. *See, e.g., Hart v. Terminex International*, 336 F.3d 541 (7th Cir. 2003)

(holding, after eight years of litigation in federal court, that the case had been wrongly removed and that all those years of litigation were a waste); *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 863 (8th Cir. 2002) ("Notwithstanding the regrettable waste of judicial and private resources in which our decision today results, we must reverse the District Court's order denying Nichols's motion to remand to state court.").

Third, and related to these, is the detriment to the public that comes in general from needless expenditure of resources on unmeritorious satellite litigation over procedural points. Once again, in this regard the close cases are even worse than the unreasonable removals. When a removing party's learned counsel attempts to find and exploit complexities and uncertainties in the removal laws in order to create a creditable argument in favor of a novel expansion of removal jurisdiction, the public interest in clarity of the jurisdiction laws is impaired. "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, The Federal Courts and the American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968), *quoted in Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Closely related to this public interest is the private interest of the plaintiff, whose lawsuit has been delayed through unnecessary procedural maneuvering by the defendant, often requiring significant attorney time and expense to the plaintiff. This private interest of the plaintiff is relevant, along with the public interests, because the roadmap takes account of the "equitable considerations" involved. *Zipes*, 491 U.S. at 759. And the waste of resources is again magnified even further when there is a truly close question of removal law, such that a District Court denies a motion to remand and continues to a final judgment, only to have that judgment vacated when the Court of Appeals resolves the close question the other way.

The substantive law of removal jurisprudence has long developed in a direction that serves these "large objectives" and "equitable considerations." The main relevant principle of substantive law is that removal statutes are strictly construed, and all doubts about the existence of removal jurisdiction are to be resolved in favor of remand. *See, e.g., Shamrock Oil*, 313 U.S. at 109; *Dixon v. Coburg Dairy*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, 'if federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (bracketed material in original, citations omitted); 14C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 3739 (noting that doubts about removal should be resolved in favor of remand, and stating that this "rule rests on the inexpediency, if not unfairness, of denying the motion for remand and thereby exposing the plaintiff to the possibility of winning a final judgment in federal court, only to have it determined on appeal that the court lacked subject matter jurisdiction, which would require the proceeding to be repeated in state court.").[2] This rule resolving the hard questions against the removing defendant is complemented by the rule forbidding appellate review of a remand order, at least when the remand is based on the

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[2] For a sample of other cases agreeing that doubts are to be resolved in favor of remand, see *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1428 (2nd Cir. 1997); *Samuel-Bassett v. Kia Motors America, Inc.*, 357 F.3d 392, 403 (3rd Cir. 2004); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir.), *cert. denied*, 530 U.S. 1229 (2000); *Coyne v. American Tobacco Company*, 183 F.3d 488, 493 (6th Cir. 1999); *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994); *Transit Casualty Co. v. Certain Underwriters*, 119 F.3d 619, 625 (8th Cir. 1997), *cert. denied* 522 U.S. 1075 (1998); *Duncan v. Stuetzel*, 76 F.3d 1480, 1485 (9th Cir. 1996); *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232 (10th Cir. 2005); *University of South Alabama v. American Tobacco Company*, 168 F.3d 405, 411 (11th Cir. 1999).

District Court's conclusion about the scope of removal jurisdiction. *See* 28 U.S.C. § 1447(d). Novel or highly debatable efforts to expand federal jurisdiction through removal are thus doubly discouraged: District Courts ought to reject them, and the appellate courts will not interfere if the District Courts do so.

In other words, under the substantive law, defendants *should not* remove cases based on novel contentions in an attempt to expand federal jurisdiction beyond its traditional limits. An argument in favor of removal should not be made merely because it is reasonably debatable; a case should not be removed if it is doubtful whether it is removable, because any such doubts are to be resolved in favor of remand. A defendant that premises removal on a legal proposition of questionable validity, in order to create new law, has ignored this fundamental rule of removal law. There is, therefore, no reason to protect such a defendant; to say that the defendant's argument was not unreasonable, is in this context to damn it with faint praise. A defendant that removes a case incorrectly has actually done something blameworthy, something that is to the detriment of the state and federal judiciary and the public as a whole as well as to the plaintiff. A plaintiff who responds successfully to those efforts has benefited the public and the judicial system, but at the cost of attorney time and effort. It is equitable, as well as being in furtherance of the large objectives of the law, that the cost should fall on the party that was in the wrong.

That is the first reason why the *Piggie Park* rule is the best interpretation of Section 1447(c): the standard for fee awards should be interpreted in a way that works with, rather than against, the concerns embodied in the substantive law. A *Piggie Park* rule will yield less federal docket congestion, less interference with state courts, and fewer wasted public and private resources, in two related ways. First, it will deter incorrect removals in many cases (as defendants, contemplating a questionable removal, will conclude that the cost of a likely fee award outweighs the chance of a benefit). And second, it will cause more plaintiffs to challenge legally-incorrect removals—and to challenge them well—thus removing even more cases from the federal docket without the necessity of lengthy discovery, summary judgment proceedings, and trials.

For these reasons, it is implausible to suggest that the Congressional desire, in enacting the fee-shifting provision in § 1447(c), was to *protect* all but the worst removing defendants. And from what we have said above, it should be clear not only that the District Court was wrong in applying a standard that is practically equivalent to *Christiansburg Garment*. Beyond that, the governing standard should not even protect those defendants who had an argument that merits a description more favorable than "not unreasonable." The public interest is not served by interesting-but-ultimately-wrong removals, any more than it is served by plainly incorrect ones. Both sorts of incorrect removals are purely a drain on public and private resources, and as we have shown above the closest questions can often create the greatest drain. Both sorts of incorrect removals, both the interesting and the patently wrong, are to be avoided under the substantive law. There is no reason to believe that the Congress meant to foster and protect *any* incorrect removals; there is every reason to believe that the Congress meant to deter them and to urge plaintiffs to challenge them. There is no reason in the law's "large objectives" and "equitable considerations" to adopt any rule other than *Piggie Park*.

B. The text of the statute, interpreted in light of the relevant legal landscape, confirms that the *Piggie Park* rule applies.

The foregoing analysis of the "large objectives" and "equitable considerations" (*Zipes*, 491 U.S. at 759) is confirmed by analysis of the text and legal context of Section 1447(c). That

text, as understood in light of the legal landscape at the time of enactment, lends itself most readily to a *Piggie Park* interpretation of the crucial word "may."

First, the 1988 deletion of the word "improvidently" in Section 1447(c) is a textual clue supporting our view. Previously, a District Court could not award even "just costs" (much less fees, for which there was no provision) unless the case had been "removed improvidently." It is hard to say precisely what level of culpability beyond merely being incorrect was denoted by the word "improvidently," and so what hurdle (if any) that word put in the way of the routine awarding of costs. But this much at least is clear: Congress intentionally deleted that word. The only inferable reason is that Congress meant to eliminate any possible suggestion that something more than simple incorrectness on the part of the removing party was required to justify a remand with award of costs. At the same time, Congress added the fee-shifting provision, with no textual or extra-textual suggestion that fees were to be reserved for a narrower set of cases than were costs. Thus the text of the statute as compared with the prior version shows Congress rejecting any requirement of culpability beyond mere incorrectness. It would therefore be wrong for the courts to re-insert the "improvidently" standard, or any other standard requiring a particular degree of wrongness, as a requirement for fee awards.

Second, the text of the statute is notable as compared to many fee-shifting statutes, in that a fee award is available *only* if the case is remanded. There is no provision for an award of fees to a defendant who successfully fends off a motion to remand, even if the grounds for that motion were quite flimsy. One can therefore infer that Congress, in enacting the fee-shifting provision, had no solicitude for removing defendants at all. The fee-shifting provision was not written to help defendants even when their removals were correct, much less when their removals were incorrect.

Congress was not seeking to deter plaintiffs from challenging removals, even when their challenges lacked merit. The fee-shifting provision goes only in one direction, towards a reduction in the number of removed cases on the federal dockets. That goal is best served by interpreting "may" in the *Piggie Park* way.

Furthermore, the one-way nature of the fee-shifting text makes a *Christiansburg Garment* interpretation (or anything close to that) all the more inappropriate, because such an interpretation would make the fee-shifting statute trivial. We should not infer that Congress does things that are trivial. If a defendant can escape fee liability by showing merely that it had a reasonable argument, then the statute provides only negligible deterrence (if any at all) of inappropriate removals and negligible compensation (if any at all) to plaintiffs, and thus fails to achieve any purpose to any material degree. *Cf. Piggie Park*, 390 U.S. at 402 n.4 (statute cannot be read as allowing fees only in case of bad faith, as courts already had the authority to issue fee awards in such cases). After all, when this statutory language was adopted, Fed. R. Civ. P. 11 already existed, and the applicability of Rule 11 to removals was explicitly underscored in Section 1016(b) of P.L. 100-702, amending 28 U.S.C. § 1446. At the time, Rule 11 explicitly authorized an award of fees as a sanction for violations of the Rule. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391-92 (1990) (quoting then-current text of Rule 11). So there was no need to enact a new statute to deter removals that violated Rule 11 standards; and it is hard to imagine the existence of any defendant who could believe that its argument in favor of removal would pass Rule 11 muster, yet would believe that its argument was unreasonable (and so would forego the opportunity to try removal, for fear of a fee award under § 1447(c)). It is virtually impossible to imagine that the Congress enacted § 1447(c)'s fee-shifting language solely for the narrow purpose of deterring that tiny hypothetical set of would-be removers who thought their

potential arguments fell in that thin range between frivolous and unreasonable. If the statute means that fees can be denied on the grounds that the defendant had a reasonable argument at its disposal, the fee-shifting aspect of the statute serves practically no purpose at all.[3]

For these reasons, the text of the statute supports our view that the existence of a reasonable argument in favor of removal (or even an incorrect argument that was better than merely reasonable) is not a basis for denying a fee award under Section 1447(c).

C. Snippets of "legislative history" do not call for a different rule.

Respondents may contend that some bits of legislative history call for a standard the same as, or close to, the standard that prevailed under pre-1988 law. This contention would be based on some sentences in the legislative history indicating that the purpose of the revised Section 1447(c) was to "replace" the requirement of filing a bond upon removal that had existed under the prior version of Section 1446. *See* 134 Cong. Rec. S 16284, 16308; H.R. Rep. 100-889, 1988 U.S.C.C.A.N. 5982, 6033.

However one feels in general about resort to reports and floor statements as guides to interpreting legislation, these uses of the word "replace" cannot do the work that Respondents want them to. The reason in a nutshell is that the word "replace" can be used either in reference to the substitution of a thing with something else that is its equivalent, or (perhaps even more commonly) in reference to the substitution of a thing with something else precisely

[3] By contrast, interpretation of Title VII's fee-shifting provision as utilizing the *Christiansburg Garment* standard in certain areas did not make that provision trivial. That is because, unlike Section 1447(c), the fee-shifting provision of Title VII applies in a variety of situations, some of which are not governed by the *Christiansburg Garment* standard.

because the replacement is *better*.[4] Respondents want "replace" here to mean the former, but there is no reason to have confidence that every member of Congress, or the majority of both Houses, or some Members or even some staffer meant that.

In fact, if the case comes down to any degree to what the Congress meant by the non-statutory word "replace" in the legislative history, the better interpretation is that the intent was to "replace" the former bond requirement with something that was *more effective* in deterring incorrect removals and in compensating plaintiffs for the work that such removals cause. If Congress had meant to leave the standard for fee awards the same as it had been—to "replace" the old scheme with something that was no different in practice—Congress would have included no reference to attorney fees at all. The prior statute had none, and so including none in the new version would have left the standard for fee awards unchanged. Instead the Congress added a specific authorization to award fees. This was truly a change. "Before the 1988 amendments to the removal statutes, an award of 'just costs' was allowed if the suit was 'removed improvidently and without jurisdiction.' . . . Under the American Rule that attorney's fees are not recoverable absent a statutory or contractual provision for them, fees were not allowed under the former statute unless counsel proceeded in bad faith or some other exception to the American rule applied." *Miranti v. Lee*, 3 F.3d 925, 927 n.2 (5th Cir. 1993).[5] The addition of

[4] *See, e.g.*, President Ronald Reagan, "Address Before the 38th Session of the United Nations General Assembly," <http://www.reagan.utexas.edu/resource/speeches/1983/92683a.htm> (last visited May 2, 2005) ("The founders [of the United Nations] sought to replace a world at war with a world of civilized order.").

[5] Pre-1988 cases to this effect include *ITT Industrial Credit Co. v. Durango Crushers, Inc.*, 832 F.2d 307, 308 (4th Cir. 1987); *Peltier v. Peltier*, 548 F.2d 1083 (1st Cir. 1977); *Muirhead v. Bonar*, 556 F.2d 735 (5th Cir. 1977).

express fee-shifting language changed the standard: it made fee awards available more broadly by "remov[ing] the need to show bad faith to receive attorney fees." *Tenner v. Zurek*, 168 F.3d 328, 330 (7th Cir. 1999); *see also id.* at 329-30 (collecting cases to similar effect); *Balcorta v. Twentieth-Century Fox*, 208 F.3d 1102, 1106 n.6 (9th Cir. 2000).

So, the very adoption of fee-shifting language is itself proof that the Congress intended to change the standard and increase the availability of fees, consistent with the Act's wider purpose of reducing docket congestion in federal courts. As to the question of how much the standard was changed, the occasional use of the word "replace" in the legislative history does not answer that. Indeed, nothing in any report or floor statement speaks to the question with any specificity or clarity. The degree of the change is to be found, instead, through the analysis of the statute's text, "large objectives," and "equitable considerations" that has been completed above.

D. The standard should not be a balancing of some set of factors.

As seen above, when identifying an applicable standard for fee-shifting statutes, this Court has most often arrived at a *rule*: the *Piggie Park* rule or the *Christiansburg Garment* one. But in interpreting the Copyright Act's fee-shifting provision in *Fogerty*, this Court arrived at a different reading of "may": a non-rule standard calling for consideration of a non-exclusive set of factors. *Fogerty*, 510 U.S. at 534 n. 19. A *Fogerty*-like non-rule standard would be inappropriate for Section 1447(c) for the following reasons.

First, a reasonably observant legislator reading or writing Section 1016(c) of P.L. 100-702 in 1988 would have anticipated that this Court would read it as incorporating a rule, and in particular the *Piggie Park* rule. By 1988, a reasonable legislator who was aware of this Court's decisions

(as Congress is presumed to be, *Jackson v. Birmingham Board of Education*, ___ U.S. ___, ___, 125 S.Ct. 1497, 1506 (2005)), would have known the following. This Court had, for twenty years, been reading the word "may" in fee-shifting statutes as incorporating rules: more often the *Piggie Park* rule, but in one instance the *Christiansburg Garment* rule. The *Christiansburg Garment* rule had been applied only where the Congress was thought to have affirmatively wanted to foster aggressive litigation by the party against whom fees were sought. Furthermore, this Court had made it clear that it would read the same words in the same way, from one fee-shifting statute to the next. *Northcross*, 412 U.S. at 428; *Hensley*, 461 U.S. at 433 n.7. And, in 1988, *Fogerty* was not yet on the books; so there was no reason to think that this Court might read "may" as incorporating no actual rule. Given all these things, Congress would have used a word other than "may" if it had intended something other than *Piggie Park* or *Christiansburg Garment*. A reasonable legislator at that time had every reason to expect that this Court would view the case as a choice between those two standards.

Second, a rule-based standard is more predictable in application, and therefore has much more chance of impacting litigation behavior. As has been seen above, among the "large objectives" at stake here, *Zipes*, 491 U.S. at 759, is the reduction of docket congestion, through deterrence of inappropriate removals and encouragement of challenges to such removals. Related to this are other "large objectives": fostering comity between state courts and federal courts, and improving litigation efficiency (which is undermined by unnecessary satellite litigation over an incorrect removal and remand). A *Fogerty*-like standard, based on weighing of various factors and interests, would have much less tendency to achieve those goals than would an appropriate rule. Not only is the application of a non-rule standard hard to predict in any given case, but even more than that a non-rule standard fosters uncertainty as to what the standard is. For instance,

even after *Fogerty*, the standard for fee awards in copyright cases seems to vary substantially from Circuit to Circuit.[6] That sort of longstanding disagreement should be avoided where possible.

Third, the things that led this Court to a non-rule standard for the Copyright Act in *Fogerty* are absent here. For one, the relevant legal and historical context is different. The fee provision of the Copyright Act, using the crucial word "may," was enacted in 1909, long before this Court's decisions in *Piggie Park* and subsequent cases had read that word as incorporating rule-based standards. *Fogerty*, 510 U.S. at 523. When the provision was reenacted without change in 1974 (*id.*), there is no reason to infer that Congress was intending to change whatever "may" had meant in the copyright statute from 1909 onward. Here, by contrast, Congress used the word "may" when making fees available for the first time in 1988, knowing that this Court had consistently interpreted that word in other fee-shifting statutes to incorporate rule-based standards. A further distinction between *Fogerty*'s analysis of the Copyright Act and this statute is that the Copyright Act's fee-shifting statute runs both ways, allowing awards in favor of a prevailing party whether it is plaintiff or

[6] *Compare Hogan Systems, Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998) (holding that fees should be "routinely" awarded under Copyright Act, as the "rule rather than the exception") *with Assessment Technologies of WI, LLC v. Wire Data, Inc.*, 361 F.3d 434, 436-37 (7th Cir. 2004) (describing this Court's discussion of *Fogerty* factors as "in need of simplification," and going on to provide such "simplification" by holding that there is a "very strong" presumption in favor of a fee award for a prevailing defendant, but no such presumption for a plaintiff who recovers substantial damages) *and Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 628 (6th Cir. 2004) (describing that Circuit's caselaw as being "consistent with the view from other circuits that it generally does not promote the purposes of the Copyright Act to award attorney fees to a prevailing defendant when the plaintiff has advanced a reasonable, yet unsuccessful claim.").

defendant. Therefore, if that provision were interpreted as a rule or strong presumption in favor of a fee award, it would in effect be the British Rule; and because the British Rule is such a rare bird in American law, this Court believed that Congress would have been clearer about it if it had meant to adopt that rule. *Id.* at 533-34. Under Section 1447(c), by contrast, the right to a fee award runs only in one direction, in that fees are available only when a case is remanded, and not when a motion to remand is denied. As has been seen above, a rule requiring a fee award for a prevailing plaintiff absent exceptional circumstances is not at all unusual in American law. So, there is no reason to demand some clear statement from Congress in order to arrive at the relatively common *Piggie Park* rule.

Finally, and most importantly, Section 1447(c) differs from the Copyright Act in regard to the central inquiry in interpreting the word "may": the "large objectives" of the law in question. *See Zipes*, 491 U.S. at 759. Here, as has been seen above, there is no public interest in protecting defendants' incentive to aggressively litigate questionable removals; to the contrary, the public interest as well as private equitable considerations weigh against such litigation tactics. The balanced and complex set of public interests on both sides of copyright litigation, where even an unsuccessful litigation stance can sometimes confer some benefit on the public, are absent in the case of incorrect removals. Thus, again, the premises for a *Fogerty*-like non-rule standard are absent here.

E. Under the correct standard, an award of fees is the only proper result in this case.

Under the correct standard, an award of fees is the only proper result in this case. If the existence of an objectively reasonable argument (or even a not-quite-good-enough argument) is ruled out as a basis for the denial of fees, then there is no remaining basis at all for the denial of fees in this case. The District Court suggested none. (Pet. App. 14a-21a). The

Court of Appeals suggested none. (Pet. App. 1a-13a). Even Defendants have suggested none. There was no special circumstance that would make an award of fees unjust. If Defendants complain about some supposed lack of clarity in the Complaint, that would be no justification; plaintiffs have no obligation to conform to some federal pleading requirement when filing a complaint in state court, and no federal obligation to make some specific request for an amount of damages. If Defendants complain that the Martins did not move to remand immediately, or that they once thought the removal to have been arguably proper, that does not make the Martins culpable either; it means at most that there was a reasonable basis for thinking the case removable, but that has already been ruled out as a basis for denying fees. Again, the burden of proving a removal proper, and of removing only when proper, is on the removing party or parties; they cannot excuse their error by pointing out that no one immediately corrected them on it. Because nothing would support the denial of a fee award under the proper standard, this Court should remand with instructions that the Martins should be awarded their fees and expenses.

V. EVEN IF THE COURT ADOPTED A SET OF FACTORS TO BE SOMEHOW WEIGHED, RATHER THAN A RULE, STILL AN AWARD OF FEES WOULD BE APPROPRIATE HERE.

We have shown above that the appropriate standard under Section 1447(c) is the *Piggie Park* rule. But even if the Court favored a non-rule approach, and set out instead a list of factors to be weighed, still a fee award would be the proper outcome in this case.

One factor justifying an award of fees, under any multi-factor analysis, would be a conclusion that there was not even any objectively reasonable basis for the removal. That would surely make an award of fees practically mandatory under

any plausible test. But the reverse is not true; in other words, the existence of a reasonable basis for the removal should not be considered as a factor weighing *against* a fee award, but instead should at most leave this factor in equipoise. We have explained above why the existence of a reasonable basis for the removal is no justification for a denial of fees, and will not repeat it at length here. The same reasons show why the existence of a reasonable argument in favor of removal should not weigh against a fee award at all.

The existence of an improper motivation on the removing defendant's part would, presumably, also justify a fee award. But again the reverse is not true; the absence of improper motivation should not weigh *against* an award but should instead leave this factor in equipoise. There are already other sources of law that allow fee awards based on improper motivation, such as 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and the inherent power to award fees for "bad faith" conduct. The point of a separate fee-shifting statute, in general, is to make fees available even when such factors are absent; otherwise there would be no need for the fee-shifting statute. The absence of an improper motivation simply moves the battleground from those other sources of law, to the statute's specific fee-shifting statute; it does not, beyond that, affirmatively help the defendant win the battle there.

A multi-factor analysis might also take account of the respective resources of the parties. In the great bulk of removed cases in our experience, the plaintiffs are individuals, perhaps seeking class-action status but often not; and the defendants are corporations with significant resources. Such facts would weigh in favor of a fee award, in general and in this case. These facts would, in effect, generate a presumption in favor of a fee award in cases (like this one) where the factors discussed above point in neither direction. If a few cases present the opposite scenario, of a relatively

poor removing defendant sued by a prosperous plaintiff, then perhaps the presumption might not apply.

Finally, a multi-factor analysis might take into account the type of error that the defendant made, in wrongly removing the case. If there are such distinctions to be made, then the error that Respondents made in this case is of the most objectionable sort: the effort to expand the boundaries of federal jurisdiction by creation of a new rule of law.[7] This is, if anything, more destructive of comity between federal and state courts, and more burdensome to overcrowded federal dockets, than a dispute over (say) whether a piece of property in dispute is worth somewhat more or somewhat less than the $75,000 that must be "in controversy" in diversity cases. As we have discussed above, a removal based on a novel and debatable but ultimately incorrect assertion of law is extremely unfortunate, because (a) it takes more work for the District Court to decide the motion to remand and for the parties to argue it; (b) it carries a heightened risk that the case will proceed after much work to a final judgment on the merits, only to have that judgment vacated on appeal for lack of subject-matter jurisdiction; and (c) it interferes with the general public interest in having the laws of jurisdiction be clear and settled. So, the presumption in favor of a fee award should if anything be stronger in cases like this one that involve novel contentions about law.

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[7] To some extent, defendants' removal was based on erroneous assertions as to the amount in controversy in the Martins' individual claims; as the Court of Appeals held in *Martin I*, 251 F.3d at 1291 (JA 59-60), defendants failed to meet their burden of proof in that regard. But more important was defendants' attempt to make new law in the Tenth Circuit regarding the aggregation of claims for punitive damages, and of attorneys' fees. It was this latter aspect of the removal—the attempt to expand the boundaries of federal jurisdiction through a new rule of law—that was the stated basis for the denial of fees, in both the District Court and the Court of Appeals.

For these reasons, even if the Court adopted a multi-factor analysis as the standard under § 1447(c), consideration of a reasonable set of factors would yield a fee award in this case.

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed, and the case remanded with instructions to award the Martins their fees and expenses. In the alternative, the judgment should be reversed and the case remanded for further proceedings under such standard as the Court adopts.

Respectfully submitted,

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No. 04-1140

In the Supreme Court of the United States

GERALD T. MARTIN AND JUANA M. MARTIN,
PETITIONERS

v.

FRANKLIN CAPITAL CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a district court abuses its discretion to award costs and fees in issuing a remand order under 28 U.S.C. 1447(c) by denying such an award where the removing party had objectively reasonable legal grounds for removal.

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INTEREST OF THE UNITED STATES

The United States frequently seeks to remove cases from state to federal court. Actions in state court against the United States or its officers and agencies may be removed pursuant to 28 U.S.C. 1442, and suits against or prosecutions of members of the armed forces may be removed under 28 U.S.C. 1442a. Additionally, 28 U.S.C. 2679 provides for the removal of state-court suits against federal employees whose conduct is certified as within the scope of their employment. Those statutes reflect a strong legislative policy in favor of adjudicating matters of federal concern in a federal forum. As a result, the United States has a substantial interest in ensuring that, to the extent that the United States and

its employees are subject to fee awards under Section 1447(c), good-faith and objectively reasonable pursuit of this policy will not expose the government and its employees to subsequent claims for attorney's fees under 28 U.S.C. 1447(c).[1]

Even when it is neither a party nor representing a party, the United States may nonetheless have a substantial interest in the removal to federal court of cases involving issues of importance to the federal government, including those raising unsettled jurisdictional questions. *E.g.*, *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005). The construction of Section 1447(c) could in practice affect the incentives for—and, consequently, the willingness of—private parties to undertake such removals. The United States therefore has an interest in clarifying the circumstances under which a district court may award fees under Section 1447(c).

STATEMENT

1. Petitioners, residents of New Mexico, filed a class action lawsuit against respondents in state court in New

[1] When the United States removes a case from state court and the case is later remanded, an award of attorney's fees would appear to be inappropriate in any event, because Section 1447(c) does not contain a waiver of sovereign immunity. That issue (including the relevance, if any, of the waiver contained in 28 U.S.C. 2412(b)), has not been resolved by the lower courts. Even if fee awards were available against the United States for unreasonably removed cases, moreover, the United States has a unique interest in litigating in federal court, which would have to be taken into account by a court considering a Section 1447(c) fee award. And some federal removals, such as those under 28 U.S.C. 2679, are not subject to the general removal statutes, including Section 1447(c). See *Haddon* v. *United States*, 68 F.3d 1420, 1426 (D.C. Cir. 1995); *Nasuti* v. *Scannell*, 906 F.2d 802, 809 (1st Cir. 1990); but see *Allstate Ins. Co.* v. *Quick*, 254 F. Supp. 2d 706, 725-727 (S.D. Ohio 2002).

Mexico in 1996. They contended that respondents had violated state unfair practice statutes and breached contractual and fiduciary duties in connection with their automobile financing and insurance contracts. J.A. 9-33. Respondents removed the case to the United States District Court for the District of New Mexico on the basis of diversity of citizenship. J.A. 34. Petitioners did not object to removal at that time. Pet. App. 2a.

Although the amount in controversy was unclear from the face of the complaint, see J.A. 9-33, respondents argued in their notice of removal that the case met the then-applicable $50,000 amount-in-controversy requirement on three grounds. First, petitioners sought treble damages on their statutory claims. Second, petitioners sought punitive damages for the entire class on their common-law claims, and respondents argued (relying on recent out-of-circuit precedent) that the total amount of the punitive damages sought for the class was attributable to the named plaintiffs for jurisdictional purposes. J.A. 35-36. Third, petitioners sought attorney's fees for the entire class on all of their claims, and respondents argued (again, relying on recent out-of-circuit precedent) that the total amount of fees sought was attributable in the aggregate to the named plaintiffs for jurisdictional purposes. J.A. 35.

In late 1997, after more than a year of federal litigation, petitioners filed a motion to remand the case to state court, asserting that their claims did not meet the amount-in-controversy requirement. Pet. App. 2a. The district court denied the motion, holding that the damages sought by petitioners, together with the aggregate amount of the requested attorney's fees, exceeded the $50,000 minimum. J.A. 42, 44, 49.

On appeal, the Tenth Circuit reversed. *Martin* v. *Franklin Capital Corp.*, 251 F.3d 1284 (2001) (*Martin I*); see J.A. 51. The court held that the claim for treble damages applied to only one state statute, under which the specific damages recoverable were uncertain. J.A. 60. With regard to the aggregation of punitive damages, the court of appeals, after noting that the issue was one of first impression within the circuit, J.A. 61, held that the aggregate amount of punitive damages sought by the class is an insufficient basis for jurisdiction. The court relied in part on *Leonhardt* v. *Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998), which was decided two years after the removal in this case and held that the claims of each class member must independently satisfy the amount-in-controversy requirement. J.A. 61. The court refused to attribute the aggregate attorney's fees for the class to the named plaintiff, for essentially the same reasons that it declined to aggregate punitive damages. J.A. 63. The court of appeals held that the case should be remanded to state court.[2]

2. Petitioners filed a motion in the district court for approximately $60,000 in attorney's fees and other costs and expenses under 28 U.S.C. 1447(c). Pet. App. 14a. They argued that Section 1447(c) presumptively entitles a party who obtains a remand to such fees. The district court denied the motion, holding that an award of fees under Section 1447(c) is discretionary. *Id.* at 16a. The court noted that the Tenth Circuit's ruling in *Martin I* had relied heavily on changes in the law that occurred

[2] The court's reliance on *Leonhardt* and its holding that each class member must independently satisfy the jurisdictional requirements, see J.A. 64-65, have been undermined by *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005). See *id.* at 2616 (citing *Leonhardt* as agreeing with view that this Court rejected).

after the removal. *Id.* at 16a-20a. The district court concluded that it was therefore inappropriate to award fees. *Id.* at 20a.

3. The Tenth Circuit affirmed. Pet. App. 1a-13a. The court of appeals agreed that the district court had discretion in awarding costs and fees under Section 1447(c). *Id.* at 4a. The court noted the "broadly accepted position that if a defendant's removal could be fairly supported by the law at the time, even if later deemed incorrect, a district court's discretionary decision not to award fees is appropriate." *Id.* at 6a. The court held that the district court had properly denied fees, because it had determined that "[respondents'] removal position was objectively reasonable at the time they sought removal." *Id.* at 7a.

SUMMARY OF ARGUMENT

I. Section 1447(c) provides that a remand order "may" require payment of attorney's fees, without expressly mandating awards in particular circumstances. Accordingly, the statute grants discretion to district courts in making such awards, which precludes petitioners' proposed rule making such awards virtually automatic. That is not to say, however, that district courts have unconstrained discretion to grant or deny fee awards on remand. This Court's cases in analogous settings have made clear that some limiting principles are implicit in similar grants of discretion. In a single instance—that of prevailing civil rights plaintiffs—the Court has held that such fee-shifting provisions presumptively require the award of fees to prevailing plaintiffs because of the special justifications for fee awards in those circumstances. *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

In other circumstances, however, the Court has made clear that the discretionary authority to award fees allows the award of fees against unsuccessful plaintiffs or intervenors only on a showing that the party's position was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); see *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754 (1989).

The *Piggie Park* presumption is based on two rationales: (1) the prevailing civil rights plaintiff's status as a "private attorney general," and (2) the losing defendant's status as a violator of substantive federal proscriptions against discrimination. Neither of those rationales is applicable here. A party that obtains a remand remains a private litigant pursuing private goals, and the removing party, though unsuccessful in the procedural dispute over removal, has in no sense violated any substantive proscriptions of federal law.

Given the absence of any justification for resort to the *Piggie Park* presumption in the context of Section 1447(c), fee awards under that statute are most appropriately governed by the more general standard of *Christiansburg Garment*, which permits fee awards only if the unsuccessful party's position was "frivolous, unreasonable, or without foundation." An unsuccessful removing party, like an unsuccessful civil rights plaintiff, has invoked a federal right granted by Congress (here, the right to remove cases). In both the civil rights context and here, it should not be assumed that Congress intended to confer a federal right while, at the same time, discouraging its invocation in all but the most obvious cases by imposing fee awards in response to reasonable, but unsuccessful, assertions of the right.

This Court has applied the *Christiansburg Garment* standard in other contexts in which the special rationales that support the *Piggie Park* presumption are inapplicable. In *Zipes*, the Court held that the "frivolous, unreasonable, or without foundation" standard applied to the award of fees against an unsuccessful intervenor in a civil rights action, 491 U.S. at 758, and the Court has suggested that the lower courts may appropriately look to similar considerations under the Copyright Act. See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994). The *Christiansburg* standard should be applied here as well.

II. The legislative history of Section 1447(c) confirms that result. The statutory reference to attorney's fees was added to Section 1447(c) in 1988 as part of an omnibus bill addressing a great many substantive and housekeeping matters concerning the federal judiciary. Nowhere in the history of that bill is there any express discussion of awards of attorney's fees. Under the deep-rooted American Rule, each party in litigation bears its own fees. If Congress had intended to reverse that rule and award fees as a matter of course to a party that successfully obtains a remand, "[s]uch a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Fogerty*, 510 U.S. at 534.

In amending Section 1447(c), Congress was most likely pursuing a much more modest goal. By 1988, there was a split in authority over whether the then-existing provision permitting an award of "costs" also permitted an award of attorney's fees in the absence of bad faith conduct, with the weight of authority holding that it did not. As a result, a number of courts had concluded that they could not award fees in response to

an unreasonable or frivolous removal, absent a showing of bad faith. It is reasonable to infer that the Judicial Conference proposed—and Congress enacted—the amendment in order to resolve that disagreement and permit fee awards when the removal was without reasonable legal foundation. Although Federal Rule of Civil Procedure 11 would now permit a similar result without the statutory amendment, the scope of Rule 11 was less clear before its 1993 amendment, which eliminated the last trace of a "good faith" defense.

III. Contrary to petitioners' arguments, the policies underlying the removal statutes suggest that fees should not be awarded in the absence of unreasonable or bad faith removals. Routinely awarding fees in remand orders would tend to discourage all but the most obviously permissible removals. There is no basis whatever for petitioners' contention that Congress adopted the 1988 amendments specifically or the removal statutes more generally in order to deter removals and, in particular, to disfavor removals that were based on reasonable, but unsettled, legal positions. To the contrary, the removal statutes themselves suggest that removal is an important aspect of a federal system of overlapping jurisdiction, not some disfavored procedural device. That view is consistent with this Court's recent affirmation that removal may serve a valuable function in permitting parties to obtain a federal forum for cases that sensibly belong in federal court. *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2367-2368 (2005). As in *Grable*, removal based on a reasonable, though not yet established, legal foundation can clarify the law for present and future litigants. If fees are awarded only when the removal is without foundation or in bad faith,

unreasonable removals will be discouraged, but litigants will not shy away from seeking clarification of unresolved legal issues relating to removal jurisdiction, and meritorious removals will face no barrier. That approach is more in keeping with the policies underlying the removal statutes.

ARGUMENT

I. ABSENT EXCEPTIONAL CIRCUMSTANCES, COURTS SHOULD AWARD ATTORNEY'S FEES UNDER SECTION 1447(c) ONLY ON A FINDING OF BAD FAITH OR OBJECTIVELY UNREASONABLE CONDUCT

Section 1447(c) provides that a remand order "*may* require payment of just costs and any actual expenses" (emphasis added). In construing closely analogous language in *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994), this Court explained that "[t]he word 'may' clearly connotes discretion," and "[t]he automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion." *Id.* at 533.[3] By the same token, petitioners' proposed standard, under which fees would automatically be awarded upon remand, is inconsistent with the discretion granted to district courts under Section 1447(c).

To be sure, "in a system of laws discretion is rarely without limits." *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 755, 758 (1989). In the context

[3] The statute at issue in *Fogerty* provides that:

> In any civil action under [Title 17], the court in its discretion may allow the recovery of full costs by or against any party other than the United States or any officer thereof. Except as otherwise provided by this title, the court *may also award a reasonable attorney's fee* to the prevailing party as part of the costs.

17 U.S.C. 505 (emphasis added).

of fee-shifting statutes in particular, this Court has repeatedly held that "the law * * * does not interpret a grant of discretion to eliminate *all* 'categorical rules.'" *Id.* at 760-761. But this Court's cases provide no warrant for petitioners' attempt to engraft a rule of automatic or presumptive fee awards onto Section 1447(c). Instead, fees should generally be awarded, as this court has concluded in a number of other contexts, only against a party that has acted without reasonable foundation or in bad faith. See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421, 422 (1978).

A. There Is No Basis For Construing Section 1447(c) To Mandate Automatic Or Presumptive Fee Awards

Petitioner contends (*e.g.*, Pet. 7) that the rule authorizing a presumptive award of fees to prevailing civil rights plaintiffs also applies to parties that obtain a remand under Section 1447(c). This Court's precedents refute that contention.

1. In *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968), this Court issued a short, per curiam opinion holding (in the context of a case under Title II of the Civil Rights Act of 1964) that a prevailing civil rights plaintiff who proves that the defendant has engaged in discrimination "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." See *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (same for Title VII); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (same for 42 U.S.C. 1988).

As this Court has repeatedly explained, that presumption in favor of fee awards to civil rights plaintiffs rests upon two critical factors. First, as *Piggie Park* itself emphasized, the plaintiff in a civil rights suit

obtains relief "not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402. An award of attorney's fees to a prevailing plaintiff under the civil rights laws thus serves to advance "the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law—assuring that the incentive to [bring] such suits will not be reduced by the prospect of attorney's fees that consume the recovery." *Zipes*, 491 U.S. at 761; *Albemarle Paper Co.*, 422 U.S. at 415 (same for Title VII). The civil rights plaintiff, whose suit is "private in form only," *Piggie Park*, 390 U.S. at 401, is the "chosen instrument" of Congress's policy, and awarding fees to a prevailing plaintiff directly furthers that policy. *Christiansburg Garment*, 434 U.S. at 418.

Second, the Court has "emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." *Zipes*, 491 U.S. at 762. Awarding fees to a prevailing plaintiff necessarily means awarding fees against "a violator of federal law." *Christiansburg Garment*, 434 U.S. at 418. See *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) ("[L]iability on the merits and responsibility for fees go hand in hand."). By contrast, the Court has declined to permit an award of fees against a defendant who is immune from substantive liability, see *Supreme Court of Va.* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 738 (1980), or an "innocent"—albeit unsuccessful—intervenor that has "not been found to have violated anyone's civil rights" in a Title VII suit, *Zipes*, 491 U.S. at 762, 763.

2. In *Christiansburg Garment*, the Court declined to apply the *Piggie Park* presumption to claims for

attorney's fees by prevailing *defendants*. The Court explained that the presumption was inapplicable because the "equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff * * * are wholly absent in the case of a prevailing Title VII defendant." 434 U.S. at 418. In this case, as in *Christiansburg Garment*, neither of the rationales that justified a virtually automatic award of fees to a prevailing plaintiff in *Piggie Park* is present.

First, a party that obtains a remand of a suit to state court has in no sense acted as a "private attorney general" or otherwise "vindicat[ed] a policy that Congress considered of the highest priority." *Piggie Park*, 390 U.S. at 402. Although the party that obtains the remand has achieved some measure of procedural success, it has done so, as far as Section 1447(c) is concerned, in the course of a private suit in pursuit of its own private interests. In enacting civil rights legislation, Congress was vitally concerned with eliminating racial discrimination in public accommodations; a virtually automatic award of attorney's fees to a prevailing plaintiff helps accomplish that end. By contrast, there is no reason to believe that Congress in the removal statutes was trying to advance any particularly weighty public interest in discouraging the use of the federal courts by litigants. To the contrary, the removal statutes reflect Congress's judgment that removal is a healthy feature of a federal system of overlapping jurisdiction. Accordingly, the "private attorney general" rationale does not support petitioners' position that a district court should automatically or presumptively award fees to a party that obtains a remand of a removed case.

Second, while a fee award to a prevailing civil rights plaintiff necessarily runs against a defendant that has been shown to have violated federal law, the same cannot be said of a fee award against an unsuccessful removing party. To be sure, the removing party in such a case has indeed failed in its effort to litigate the case in federal court pursuant to statutes that expressly provide for removal. But a party that has been unsuccessful in seeking a federal forum has not thereby violated any substantive norms established by federal law. A party who reasonably but unsuccessfully invokes substantive federal law, like the civil rights statutes, does not violate any federal policy. The same is true of a party who reasonably but unsuccessfully invokes a federal forum or procedural right. Because a remand does not establish that the removing party has violated substantive law, the "violation of law" rationale does not support petitioners' claim that a party that obtains a remand is entitled to an automatic or presumptive award of fees. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 688 n.9 (1983) (success on "purely procedural issues" insufficient to trigger award of fees).

3. Petitioners' contention that a successful remand movant should automatically or presumptively be awarded fees is also inconsistent with *Fogerty*. In that case, the Court rejected the argument that the Copyright Act's fee-shifting provision "was intended to adopt the 'British Rule,'" under which the prevailing party would "be awarded attorney's fees as a matter of course, absent exceptional circumstances." 510 U.S. at 533. The Court explained that "Congress legislates against the strong background of the American Rule," under which "parties are to bear their own attorney's fees." *Ibid.* Given only a statute that granted discretion to district

courts to award fees, the Court stated that it would "find it impossible to believe that Congress, without more, intended to adopt the British Rule." *Id.* at 534. As the Court explained, "[s]uch a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Ibid.* The Court accordingly concluded that "attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." *Ibid.* As in *Fogerty*, the virtually "automatic awarding of attorney's fees" that petitioners seek here would improperly "pretermit the exercise of th[e] discretion" that Congress granted in Section 1447(c). *Id.* at 533.

B. This Court's Cases Establish That Fees Should Not Be Assessed Under Section 1447(c) Absent A Showing Of Fault

When, as here, the special rationales that justify a presumptive award of fees to prevailing parties in civil rights and similar cases are not applicable, this Court's cases establish that an award of fees under a discretionary fee-shifting statute like Section 1447(c) should generally depend on the good faith and objective reasonableness of the removing party's position.

1. Having found that the rationales that support a virtually automatic award of fees to a prevailing civil rights plaintiff are inapplicable to a prevailing civil rights defendant, the Court in *Christiansburg Garment* delineated the standard that governs an award of fees to a prevailing defendant. The Court held that "a plaintiff [in a Title VII case] should not be assessed his opponent's attorney's fees unless a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it

clearly became so," or that the plaintiff "brought or continued [the] claim in *bad faith*." 434 U.S. at 422. That standard should govern here as well.

Christiansburg Garment noted that Congress has granted "limited exceptions" to the American Rule only "under selected statutes granting or protecting various federal rights," such as the civil rights laws. 434 U.S. at 415 (quoting *Alyeska Pipeline Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975)). A plaintiff who brings a civil rights case invokes such a federally protected right. Because "seldom can a prospective plaintiff be sure of ultimate success," awarding fees merely because the plaintiff is ultimately unsuccessful would discourage such invocation. 434 U.S. at 422. Absent evidence to the contrary, it should not be assumed that Congress, at one and the same time, has granted a federal right while also taking steps to discourage invocation of that right whenever ultimate success is less than certain. Accordingly, fees are awarded against an unsuccessful civil rights plaintiff only upon a showing that the plaintiff acted in bad faith or without reasonable legal foundation. *Ibid.*

An unsuccessful removing party is in a position analogous to that of an unsuccessful civil rights plaintiff. The party that unsuccessfully removes a case, like the unsuccessful civil rights plaintiff, has invoked a federally conferred right—namely, the right to remove a case to federal court. A rule of automatic or presumptive fee awards to the unsuccessful removing party—like a rule providing for a similar award of fees against an unsuccessful civil rights plaintiff—would operate to discourage the party attempting to make use of that right from doing so in any but the most certain cases. Accordingly, as in *Christiansburg Garment*, a court

should not award fees against the party that has invoked the federal right in the absence of any showing of fault. The appropriate standard for fee liability is not a mere failure to prevail, see 434 U.S. at 422, but rather a showing that the party's position is "frivolous, unreasonable, or groundless," or advanced in bad faith. *Ibid.*

2. That conclusion is supported by other decisions of this Court, which have adopted or approved the same or a similar approach. In *Zipes*, the Court held that fee awards against losing intervenors are subject to the *Christiansburg Garment* standard, and thus are appropriate "only where the intervenors' action was frivolous, unreasonable, or without foundation." 491 U.S. at 761. The Court noted that such intervenors "are not * * * disfavored participants" in the proceedings, *id.* at 763, and that awarding fees against them "would further neither the general policy that wrongdoers make whole those whom they have injured nor Title VII's aim of deterring employers from engaging in discriminatory practices," *id.* at 762. Similarly here, an unsuccessful removing party is not a "disfavored participant" in the proceeding, but a party that has attempted to invoke a congressionally granted right. And awarding fees against an unsuccessful removing party, like awarding fees against an unsuccessful Title VII intervenor, would similarly fail to vindicate any principle of compensation in the substantive law. Accordingly, as in *Zipes*, fees should ordinarily be awarded against the removing party under Section 1447(c) only if that party's position is without reasonable justification or taken in bad faith.

In *Fogerty*, the Court was not called upon to announce the standard for awarding fees under the Copyright Act, because the question presented was whether "dual" standards, rather than a uniform

standard, should govern awards of fees to prevailing plaintiffs and prevailing defendants, respectively. 510 U.S. at 521. After rejecting the "dual" standards approach, however, the Court noted that the Third Circuit had held that courts should consider factors such as "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence" in awarding fees under the Act. *Id.* at 534 n.19 (quoting *Lieb* v. *Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)). The Court "agree[d]" that those factors "may be used to guide courts' discretion" in awarding fees. *Ibid.* Aside from the particular substantive policies of the Copyright Act in favor of compensation and deterrence, which have no application to the procedural issue in this case, those factors focus on the good faith and objective justifications supporting the losing party's legal position. As in *Fogerty*, those factors should guide a district court's discretion in awarding fees under Section 1447(c).

II. THE LEGISLATIVE HISTORY OF SECTION 1447(c) SUGGESTS AT MOST A PURPOSE TO AUTHORIZE FEES IF THE REMOVAL WAS WITHOUT REASONABLE LEGAL FOUNDATION

This Court observed in *Fogerty* that if Congress intended a fee-shifting statute to provide for an automatic or presumptive award of fees, at the very least some "legislative comment" would be expected to that effect. 510 U.S. at 534. The history of Section 1447(c) reveals no such "legislative comment." To the contrary, the legislative record is silent, and it is reasonable to infer that the statutory reference to attorney's fees was

included, at most, for the more modest purpose of resolving confusion in the lower federal courts by making clear that courts were permitted to award fees in a remand order when the removal had been shown to be without a reasonable justification.

1. At the time of its amendment by the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Tit. X, § 1016(c), 102 Stat. 4670 (the 1988 Act), Section 1447(c) provided that in cases "removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs." 28 U.S.C. 1447(c) (1982). The 1988 Act amended the statute to provide that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The legislative history of the 1988 Act does not specifically discuss the addition of the words "including attorney fees" in the amended Section 1447(c), and otherwise suggests, at most, that the amendment was intended to accomplish only modest objectives, not the complete departure from the American Rule posited by petitioner.

The 1988 Act originated in proposals from the Judicial Conference that addressed a wide range of issues concerning the federal judiciary. See *Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 16-17 (1987-1988). Those proposals originally included no provisions concerning removal. Two days before a congressional hearing on the subject on September 23, 1987, the Judicial Conference adopted some proposals addressing removal, including what became the amendment to

Section 1447(c). See *id.* at 2, 17, 50-52. The new proposals were presented to Congress and incorporated into the bill, see H.R. Rep. No. 889, 100th Cong., 2d Sess. 20-21 (1988), and were enacted without change in the 1988 Act.

As the House Report explained, the removal provisions

> would, among other things, allow the citizenship of fictitious or "Doe" defendants to be disregarded for removal purposes; simplify the "pleading" requirements for removal; establish a one-year limit on removal based on diversity jurisdiction; eliminate the bond requirement on removal procedure; and regulate the joinder of additional parties after removal.

H.R. Rep. No. 889, *supra*, at 71. The Report made only two references to the provision for award of costs and fees at issue in this case. The Report commented that

> the proposed amendment to section 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate.

Id. at 72. And the Report added that "[t]he proposal also would amend section 1447(c) to ensure that the court may order payment of actual expense caused by an improper removal." *Ibid.* Those same two comments were included in a section-by-section analysis prepared in connection with Senate consideration of the bill. See 134 Cong. Rec. 31,064-31,065 (1988).

In the floor debates, there was no specific mention at all of the attorney's fee provision. The omnibus bill as a whole, however, was repeatedly described as "noncontroversial." 134 Cong. Rec. at 23,583 (Cong. Moorhead),

23,584 (same), 31,050 (Sen. Heflin). Had Congress intended to reverse the American Rule fundamentally and provide for routine fee awards to a party that is successful on a remand motion, "such a bold departure from traditional practice would surely have drawn more explicit statutory language and legislative comment." *Fogerty*, 510 U.S. at 534. The complete absence of any comment in the legislative record suggests that the attorney's fees provision was intended at most to make a modest change in existing law, not the 180-degree turn that petitioners' view would entail.[4]

2. The legal context in 1988 suggests a reasonable alternative explanation for the amendment. At the time of the 1988 Act, there was disagreement among the lower courts over the extent to which the preexisting statutory authorization to award costs included authority to award an attorney's fee. A few courts held that fees could be awarded as "costs" under Section 1447(c) without a finding of bad faith.[5] The weight of the

[4] Petitioners argue (Br. 24) that by deleting the word "improvidently" from Section 1447(c), the 1988 Act "reject[ed] any requirement of culpability beyond mere incorrectness" for the imposition of costs. Prior to 1988, however, a showing that the case was removed "improvidently and without jurisdiction" was a prerequisite for a *remand* under Section 1447(c), as well as for an award of costs. There is no reason to believe that Congress intended, when it deleted that phrase, to change the substantive conditions for remand or to affect the circumstances in which costs and fees could be awarded.

[5] See, *e.g.*, *Township of Elba* v. *Steffenhagen*, 664 F. Supp. 1238, 1241 (E.D. Wis. 1987) (awarding fees for "patently deficient" removal); *Syms, Inc.* v. *IBI Sec. Serv., Inc.*, 586 F. Supp. 53, 56-57 (S.D.N.Y. 1984) (holding that fees can be awarded "where a removal is effected in bad faith *or* is predicated upon a diversity of citizenship that clearly does not exist," and awarding fees because "removal was clearly improper") (emphasis added); cf. *Elsis* v. *Hertz Corp.*, 581 F. Supp. 604, 608 (E.D.N.Y. 1984) (awarding fees for "poorly premised," eve-of-trial

authority, however, was that fees could not be awarded under Section 1447(c) absent a finding of bad faith under the ordinary standards of the American Rule.[6] A number of courts had specifically held that they could not award fees when a party, although not acting in bad faith, had engaged in conduct relating to removal that was without reasonable legal justification.[7]

removal, without express finding of bad faith).

[6] See, *e.g.*, *Cap Makers Union* v. *Feinstein*, 671 F. Supp. 258, 261 (S.D.N.Y. 1987) (denying application for costs and fees because "bad faith has not been shown"); *Armstrong* v. *Goldblatt Tool Co.*, 609 F. Supp. 736, 739 (D. Kan. 1985) (awarding costs on remand, but not awarding fees because no bad faith); *Schmidt* v. *National Org. for Women*, 562 F. Supp. 210, 215 (N.D. Fla. 1983) (same); *Zoyoipoulos* v. *Palombo*, 584 F. Supp. 867 (D. Colo. 1984) (fees unavailable on remand without showing of bad faith); *Zimmerman* v. *Conrail*, 550 F. Supp. 84, 87 (S.D.N.Y. 1982) ("Fees incurred in contesting removal have been awarded when the removing party has acted in bad faith."); see also *Bell Fuels* v. *Miller*, No. 88C1915, 1988 WL 124337, at *1 (N.D. Ill. Nov. 17, 1988) ("The overwhelming weight of the authority * * * is that attorneys fees may be awarded only upon demonstration that the removal petition was filed in bad faith."); cf. *Muirhead* v. *Bonar*, 556 F.2d 735, 736 (5th Cir. 1977) (awarding fees on finding that second removal of case was in "bad faith"); *Peltier* v. *Peltier*, 548 F.2d 1083, 1084-1085 (1st Cir. 1977) (same); *Smith* v. *Student Non-Violent Coordinating Comm.*, 421 F.2d 522, 524 (5th Cir. 1969) (same); *Baldwin* v. *Burger Chef Sys., Inc.*, 507 F.2d 841, 842 (6th Cir. 1974) (fees not awardable on remand because no showing of bad faith or other exceptional circumstances).

[7] See, *e.g.*, *Cornwall* v. *Robinson*, 654 F.2d 685, 687 (10th Cir. 1981) (fees not available on "findings of negligence, frivolity, or improvidence" under Section 1447(c)); *Medical Legal Consulting Serv., Inc.* v. *Covarrubias*, 648 F. Supp. 153, 158-159 (D. Md. 1986) (finding that "basis for removal" was "sufficiently weak" for award of costs, but no basis for award of fees because no bad faith shown); *Moore* v. *Bishop*, 520 F. Supp. 1187, 1188 (D.S.C. 1981) (awarding costs on finding that removal not "substantial, close, or novel," but finding no authority to award fees); *Pack* v. *Rich Terminal Co.*, 502 F. Supp. 58, 60 (S.D. Ohio 1980)

In that context, it is reasonable to infer that the Judicial Conference's proposal to amend Section 1447(c), and Congress's enactment of it, reflected an intent to resolve the existing confusion and clarify that courts could award fees for objectively unreasonable removals. Citing this Court's decision in *Alyeska*, which held that district courts generally may not award fees absent a finding of bad faith, a prominent treatise had proposed just that change. See 14 Charles A. Wright et al., *Federal Practice and Procedure* § 3739, at 587-588 (2d ed. 1986) ("It would be desirable *in some cases* to tax the removing parties with an attorney's fee on the motion to remand, but an amendment of the statute probably is necessary to provide courts with authority to do so.") (emphasis added). In light of the firm tradition and presumptions reflected in the American Rule, it could be argued that Congress's mere addition of discretionary authority to award fees may have been insufficient to achieve even that modest purpose. But in no event can that bare grant of discretion be used to displace the American Rule completely and authorize an automatic or presumptive award of fees in every case upon remand, as petitioners propose.

3. Petitioners argue (Br. 25) that construing Section 1447(c) to accomplish a more modest objective and to authorize fees only on a finding of bad faith or lack of reasonable legal foundation would merely duplicate Federal Rule of Civil Procedure 11. The 1988 text of Rule 11, however, imposed sanctions for pleadings that were not "warranted by existing law or a *good faith*

(awarding costs because "nonremovability is obvious," but finding no basis to award fees). See also *Schmidt*, 562 F. Supp. at 215 (finding fees not available "for negligence, frivolity, or improvidence," but awarding costs on a "clearly less stringent" showing).

argument for the extension, modification, or reversal of existing law" (emphasis added). It was not until 1993 that the reference to "good faith" was removed, and Rule 11 was amended to require a certification that arguments were "warranted by existing law or by a *nonfrivolous* argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. Pro. 11(b)(2) (emphasis added).[8] Although the pre-amendment version of the rule had been construed by most courts to impose an objective standard,[9] not all courts agreed with that view.[10] Ac-

[8] See Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 Ind. L.J. 171, 196 (1994) ("The critical change included in the 1993 amendment of Rule 11 * * * is the requirement that attorneys * * * present papers which are warranted by a nonfrivolous, rather than a good faith, 'argument for the extension, modification or reversal of existing law or the establishment of new law.'"). Even today, monetary sanctions may be assessed against counsel, but not against represented parties, for frivolous or unreasonable arguments for modifying existing law under Rule 11(c)(2)(A). Section 1447(c) includes no such limitation, and it thus may continue to provide authority that goes beyond Rule 11.

[9] See, *e.g.*, *Burda* v. *M. Ecker Co.*, 2 F.3d 769, 774 (7th Cir. 1993) ("Rule 11 does not require that the district court make a finding that the transgressor acted in bad faith."); *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) ("Simply put, subjective good faith no longer provides the safe harbor it once did."); *Lieb* v. *Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986) (same); *Zaldivar* v. *City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986) (similar); see also *Wolst* v. *American Airlines, Inc.*, 668 F. Supp. 1117, 1120 (N.D. Ill. 1987) (holding fees unavailable under Section 1447(c) absent bad faith, but awarding them under Rule 11).

[10] See, *e.g.*, *Nelson* v. *Piedmont Aviation, Inc.*, 750 F.2d 1234, 1238 (4th Cir. 1984) (affirming district court's refusal to award fees based on finding that there was "insufficient evidence * * * to rule that the action was filed in 'bad faith' under [Rule 11]"), cert. denied, 471 U.S. 1116 (1985); *Williams* v. *Birzon*, 576 F. Supp. 577, 580 & n.5 (W.D.N.Y. 1983) (holding that, because "this action was not commenced in bad faith," it

cordingly, Congress would have had good reason to address the confusion, in the specific context of remands under Section 1447, and provide authority for courts to award fees for an unreasonable, but good faith, removal.

4. Petitioners argue (Br. 19) that "a major concern" of the 1988 Act was "the avoidance of further burdens on the already too-burdened federal judiciary." See also Pet. Br. 11-12. According to petitioners (Br. 19), construing Section 1447(c) to permit an automatic or presumptive award of fees would address that congressional concern, by discouraging parties—even (or especially) those whose cases "present[] a close question" on removal—from removing their cases to federal court.

Petitioners are mistaken. The 1988 Act as a whole included numerous provisions addressing a wide range of matters, from modifications to the Federal Circuit's jurisdiction to judicial housekeeping matters such as

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is "not * * * the type of situation * * * contemplated in the amendment to Rule 11"), aff'd, 740 F.2d 955 (2d Cir. 1984); *D.G. Rung Indus., Inc.* v. *Tinnerman*, 626 F. Supp. 1062, 1064 (W.D. Wash. 1986) (declining to impose sanction under Rule 11 because court "does not find * * * bad faith"); *Cap Makers Union*, 671 F. Supp. at 261 (in removal case, denying "application for costs and Rule 11 sanctions" because "bad faith has not been shown"); *Sam & Mary Housing Corp.* v. *New York*, 632 F. Supp. 1448, 1453 (S.D.N.Y. 1986) ("An assessment of fees against counsel [under Rule 11] requires a showing that the attorney acted in bad faith to willfully abuse the judicial process."); *Can Am Indus.* v. *Firestone Tire & Rubber Co.*, 631 F. Supp. 1180, 1185 (C.D. Ill. 1986) ("There is only one test required for allowing sanctions under Rule 11 and that is that there be a showing 'of subjective bad faith' on the part of the party to be sanctioned."); see also *Nesmith* v. *Martin Marietta Aerospace*, 833 F.2d 1489, 1491 (11th Cir. 1987) (fees not awardable under Rule 11 because no bad faith shown, but fees were awardable under *Christiansburg Garment* against Title VII plaintiff who brought case "without foundation").

jury selection and the use of interpreters. The most significant suggested means of easing the burden on the federal judiciary was the proposal to abolish diversity jurisdiction. That proposal, however, was *not* enacted. It was eliminated in committee, see H.R. Rep. No. 889, *supra*, at 44-45, and the enacted bill instead simply raised the amount-in-controversy requirement in diversity cases from $10,000 to $50,000. See 1988 Act § 201, 102 Stat. 4646. Insofar as Congress sought to address congestion in the federal courts, therefore, the most that can be said is that Congress took that goal into account in the provisions of the 1988 Act directly addressing the breadth of federal jurisdiction. Congress certainly did not attempt to achieve that goal in each provision of the Act, and even when Congress addressed that goal, it did not pursue it absolutely. There is no warrant for construing every provision of the Act as if relieving congestion in the federal courts was Congress's exclusive and single-minded goal.

Indeed, with respect to the 1988 Act's removal provisions in particular, there is no basis for petitioners' claim that Congress's single-minded or principal intent was to ease the burden on federal courts by discouraging removal. Aside from the costs-and-fees provision, Congress amended the removal provisions in five respects. Four (allowing the citizenship of fictitious or "Doe" defendants to be disregarded for removal purposes, simplifying the pleading requirements for removal, requiring a motion to remand for a defect in removal procedure to be made within 30 days, and eliminating the bond requirement) tended to make removal more easily available or more convenient, while only one (establishing a time limit on removal in diversity cases) restricted it. See p. 19, *supra*. Neither

the provisions of the 1988 Act nor its legislative history suggests any intent to discourage removal generally or to make cases removed based on a reasonable (though ultimately unsuccessful) legal justification more costly.[11]

III. HINGING A FEE AWARD ON A FINDING OF BAD FAITH OR LACK OF REASONABLE LEGAL JUSTIFICATION CONFORMS TO THE POLICIES UNDERLYING THE REMOVAL STATUTES

1. Petitioners correctly assert (Br. 9) that awarding fees automatically or presumptively against an unsuccessful removing party "create[s] incentives" because doing so would "deter one side [the removing party] from engaging in behavior [removing a case on a less-than-certain legal basis] that will give rise to a fee award, and * * * encourage the other side to challenge such behavior." Were parties routinely assessed fees for reasonably removing a case that was later remanded, such "hindsight logic" would "discourage all but the most airtight [removals], for seldom can a prospective [party] be sure of ultimate success. * * * [N]o matter

[11] Petitioners mistakenly argue (Br. 24-25, 31) that fees are awardable under Section 1447(c) only to the party that obtains the remand, and not to the unsuccessful removing party. While such awards presumably constitute the vast majority of awards under Section 1447(c), nothing in the statutory text precludes an award of fees to the removing party, and there are circumstances in which such an award has been found appropriate. See *Brooks* v. *Pre-Paid Legal Servs.*, 153 F. Supp. 2d 1299, 1302 (M.D. Ala. 2001) (awarding fees to defendant/removing party); *Shrader* v. *Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 369-371 (E.D. Pa. 1995) (same); *Barraclough* v. *ADP Auto. Claims Serv., Inc.*, 818 F. Supp. 1310, 1313 (N.D. Cal. 1993) (same); but cf. *Fowler* v. *Safeco Ins. Co.*, 915 F.2d 616, 618 (11th Cir. 1990) (decided under pre-1988 version of Section 1447(c); stating that former version of statute "appears to contemplate the imposition of costs only on the defendant").

how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable." *Christiansburg Garment*, 434 U.S. at 422.

Petitioners argue, however, that, because removal may impose certain costs and because the federal judiciary is overburdened, the policy underlying the removal statutes is to discourage removal in all but the most clear-cut cases. Indeed, petitioners contend (Br. 19, 23) that a fee award is particularly warranted to deter parties from removing cases based on a reasonably sound but ultimately unsuccessful view of the law, because "the closest questions can often create the greatest drain" on the judiciary. *Id.* at 23; see also *id.* at 33 ("[T]he existence of a reasonable basis for the removal should not be considered as a factor weighing *against* a fee award.").

As explained above, there is no basis for petitioners' conclusion that the 1988 Act—and, specifically, its removal provisions—were enacted in single-minded pursuit of the goal of deterring removal so as to ease docket congestion in the federal courts. More generally, however, this Court has recognized that the removal statutes advance important and legitimate interests in permitting certain claims to be litigated in a federal forum.

Last Term, for example, the Court emphasized in a removal case "the commonsense notion that a federal court ought to be able to hear claims * * * that * * * turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 125 S. Ct. at 2367. The Court noted that even an issue that arose in litigation between private parties over the meaning of a federal tax provision was "an

important issue of federal law that *sensibly belongs in a federal court.*" *Id.* at 2368 (emphasis added). See also *Arizona* v. *Manypenny*, 451 U.S. 232, 241 (1981) (noting that) federal-officer removal "permits a trial upon the merits of the state-law question free from local interests or prejudice" and rejecting "narrow, grudging interpretation of 28 U.S.C. 1442(a)(1)); cf. *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005) (noting Congress's purpose in establishing diversity jurisdiction, "which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants"). Those interests would be disserved by petitioners' rule, which is designed to discourage parties from removing on the basis of a reasonable, but not ironclad, jurisdictional theory.

2. As petitioners argue (Br. 18), an improperly removed case may temporarily set askew "the proper balance between federal and state control." That balance, however, is ultimately restored upon remand. A case involving a federal question that is *not* removed due to the perverse incentives of petitioners' standard, however, would impose a comparable cost: It would deprive the parties of the benefits of a federal forum that Congress intended to give them, including the traditional role of the federal courts in adjudicating substantial questions of federal law in an experienced and uniform way. And that deprivation would be permanent. In this regard, it bears emphasis that the removal statutes play a central role in a federal judicial system of overlapping jurisdiction. The smooth and undistorted functioning of the removal statutes forms a background against which Congress makes choices

about exclusive and concurrent jurisdiction, as well as the optimal scope of the diversity statute.

Removal would be a particularly poor context in which to experiment with a judicially imposed policy decision to discourage parties from taking action based on an objectively reasonable but debatable legal foundation. A motion for removal generally must be filed at the very outset of litigation, before extensive discovery (or even a defendant's own detailed factual investigation) can take place. See 28 U.S.C. 1446(b). Because remand orders are generally not reviewable, see 28 U.S.C. 1447(d), there are particular areas of uncertainty in the law of removal. And, as this Court has noted, there is no "'single, precise, all-embracing' test for" subject-matter jurisdiction. *Grable*, 125 S. Ct. at 1268. Cf. *Christiansburg Garment*, 434 U.S. at 422 (noting that "[d]ecisive facts may not emerge until discovery or trial," or "[t]he law may change or clarify in the midst of litigation").[12] In the face of such uncertainty, "[t]o take the further step of assessing attorney's fees against [parties] simply because they do not finally prevail would substantially add to the risks inhering in most litigation." *Ibid.*

The litigation of issues—even removal issues—that are uncertain can have substantial utility in clarifying the law. In *Grable*, for example, a reasonable, though controversial, removal ultimately led to this Court's unanimous decision affirming the removing party's jurisdictional theory and resolving a conflict in the

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[12] In this case, for example, petitioners did not object to the removal until facts limiting the amount in controversy emerged more than a year later. The eventual remand was based primarily on post-removal decisions of the circuit that have once again become open to question in light of this Court's decision in *Exxon Mobil*. See p.4 & note 2, *supra*.

circuits on an important question that had been left in some doubt by the Court's prior cases. For courts to impose costs and fees automatically or presumptively would create a Catch-22 for removing parties: In the name of reducing work for the courts, defendants would be dissuaded from taking the very steps that might help elucidate the law—with the result that unresolved issues would remain uncertain, and cases would remain close.

3. Ultimately, declining to award fees absent a showing that a party has acted in bad faith or without reasonable justification is the approach most consistent with the policies of the removal statutes. Removals that are frivolous or unreasonable will be discouraged; the validity of removals that are based on reasonable legal premises may be litigated and resolved by the courts without obstacle; and removals that are meritorious will face no barrier.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISION INVOLVED

28 U.S.C. 1447(c) provides:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Supreme Court, U.S.
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JUL 25 2005
OFFICE OF THE CLERK

No. 04-1140

In The Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION FOR REVIEW

What legal standard governs the decision whether to award fees upon remanding a removed case to state court?

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RESPONDENTS' BRIEF ON THE MERITS

Respondents Franklin Capital Corporation and Century-National Insurance Company respectfully submit that the judgment below should be affirmed for the following reasons.

STATEMENT OF THE CASE

In 1996 Plaintiffs filed this class action in New Mexico state court, alleging they had been overcharged for collateral protection insurance after they failed to maintain their own insurance on the cars they had purchased on credit. JA 9-10. Plaintiffs sought to void the credit sale contracts for their cars and to recover actual and treble damages, punitive damages, and attorney fees. JA 27, 29, 31.

Defendants timely removed the case to district court based on diversity jurisdiction. JA 1, 34. Plaintiffs did not file a remand motion. JA 1-2. Instead, they litigated the case on the merits in federal court, opposing Century-National's motion to dismiss, taking discovery, and ultimately moving for class certification. *Id.*

More than a year after removal, plaintiffs first raised a "concern" about jurisdiction at oral argument on the motion to dismiss after the district court indicated it might grant the motion. Plaintiffs' counsel acknowledged that at the time of removal, he thought the case fell within the federal courts' diversity jurisdiction and consciously chose not to contest jurisdiction. JA 38. But, he said, an affidavit submitted in opposition to plaintiffs' class certification motion revealed plaintiffs had not paid for collateral

protection insurance, thus triggering his new concern that the amount in controversy was not met. JA 39; *cf. Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (amount in controversy must be established on the face of the complaint or the removal notice, not by later-filed documents).

The district court reserved its ruling on the motion to dismiss and invited plaintiffs to file a motion attacking jurisdiction. JA 40. Sixteen months after removal, plaintiffs filed such a motion, attacking only the amount in controversy. JA 2 item #38.

Defendants filed opposition contending the amount in controversy requirement was satisfied in three independent ways: (1) the named plaintiffs individually sought relief worth more than $50,000, and the district court could exercise supplemental jurisdiction over class members' claims pursuant to 28 U.S.C. § 1367 even if they claimed less than $50,000; (2) the class' punitive damages claims could be aggregated and exceeded $50,000; and (3) the class' claim for attorney fees could be aggregated and exceeded $50,000. JA 2, items #39, 40.

The district court denied plaintiffs' remand motion, finding that plaintiffs individually stated colorable claims for an amount that was not certainly less than $50,000. JA 4, item #52, 42-43. The district court denied plaintiffs' later request that it certify that ruling for interlocutory appeal under 28 U.S.C. § 1292(b), stating: "[m]y exercise of subject matter jurisdiction on the remand issue was properly based upon these considerations of the [complaint's] allegations as of the time of removal. I conclude there is no substantial ground for difference of opinion on this issue." JA 48.

The district court also denied plaintiffs' class certification motion and granted Century-National's motion to dismiss. JA 3-4, items #50-51. At plaintiffs' request, the district court entered judgment dismissing the complaint with prejudice so plaintiffs could immediately appeal the jurisdictional issue. JA 4, item #61.

The Court of Appeals held that defendants had not proven by a preponderance of the evidence, based solely on the complaint and notice of removal, that plaintiffs individually sought more than $50,000.[1] *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290-91 (10th Cir. 2001); JA 59-60. It also ruled, as a matter of first impression in that circuit, that neither punitive damages nor attorney fees could be aggregated in a class action to reach the amount in controversy. *Id.* at 1292-93; JA 61-64. The Court of Appeals reversed the judgment and remanded the case to the district court, directing that it remand the case to state court. JA 65.

Plaintiffs then moved for an award of attorney fees and expenses under 28 U.S.C. § 1447(c). JA 5, item #68. The district court denied the motion. It noted that it had discretion to award fees even though no bad faith was shown. Pet. 16a. It should award fees, it said, if it found that the removal was not proper or legitimate – a standard "much different than colorable" – under legal authority

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[1] The Court of Appeals also pointed out that *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 638-41 (10th Cir. 1998) – issued after judgment was entered in this case – held that despite 28 U.S.C. § 1367 each class member individually had to meet the amount in controversy requirement. *Martin*, 251 F.3d at 1294; JA 64. *Leonhardt* was wrong, however, as this Court held last term. *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. ___, 125 S.Ct. 2611, 2625 (2005).

extant at the time of removal. *Id.* Aggregation of punitive damages and attorneys fees, the district court concluded, were theories supported by legal authority at the time of removal; hence, the removal was proper. Pet. 17a-19a. Summing up, the district court said:

> . . . I conclude that in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area. . . . . Under the circumstances set forth in this decision, I conclude that it is not appropriate to award fees . . . .

Pet. 20a.

Plaintiffs appealed denial of the fee motion, and the Court of Appeals affirmed. It held that the district court had applied the appropriate legal standard in deciding the motion. Pet. 4a-7a. It also agreed with the district court "that at the time defendants removed this action to federal court on the basis of aggregating punitive damages, they 'had objectively reasonable grounds to believe the removal was legally proper.'" Pet. 7a-8a. "Given the uncertain state of the law on aggregation of punitive damages," said the Court of Appeals, "we cannot say the district court abused its discretion in declining to award fees to [plaintiffs]." Pet. 13a.

SUMMARY OF ARGUMENT

The issue here is one of statutory interpretation. What does the third sentence of 28 U.S.C. § 1447(c) mean? And how did Congress intend it to be applied?

The sentence's text is short and unsupportive of petitioners' proposal that fees should be awarded virtually automatically upon remand. The statute states that a remand order "may require" payment of "just" costs and any actual expenses, including attorney fees. Nothing in the text suggests a near-mandatory fee award standard; both "may" and "just" point in the opposite direction.

The provision's history, too, contradicts petitioners' submission. Both the immediate circumstances of the 1988 amendment that gave the sentence its current form, and the broader history of the statute's predecessors, show that § 1447(c)'s third sentence is not a cost- or fee-shifting statute at all. Instead, the sentence is a grant of jurisdiction or power only, reversing a common law rule under which a court could enter no monetary award when it lacked subject matter jurisdiction.

Neither the third sentence nor the rest of § 1447(c) specifies when or how the power it grants may be exercised; other provisions of federal law do so. 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d)(1), and the case law interpreting them determine when a remand order may require payment of costs. Similarly, attorney fees and other nontaxable expenses may be awarded on remand only when allowed by other law, such as Fed. R. Civ. P. 11, or when permissible under a recognized exception to the American Rule, such as the bad faith, vexatious litigant exception.

Even if viewed as a fee-shifting statute, § 1447(c)'s third sentence should not be governed by a categorical rule, such as petitioners propose, requiring attorney fee awards except in extraordinary circumstances. None of the factors that led the Court to adopt categorical rules regarding fee awards in civil rights cases is present here.

Neither § 1447(c)'s statutory language nor its legislative history support a categorical rule. The "large objectives" of the pertinent statutes and the "equitable circumstances" of the parties weigh against adopting any categorical rule. The statutes generally governing federal jurisdiction and removal, and § 1447(c) in particular, were not enacted to discourage removal, reduce federal caseloads, or avoid litigation of jurisdictional issues. State court plaintiffs are not "the chosen instrument of Congress." Typically, they do not vindicate any federal policy, least of all one "that Congress considered of the highest priority." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). A defendant who unsuccessfully removes is not a violator of federal law. *See Independent Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 762-63 (1989).

If treated as a fee-shifting statute, § 1447(c)'s third sentence should be read, as the statute interpreted in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), to require a multi-factor analysis, turning principally on the reasonableness of the removal.

Any proper interpretation of § 1447(c) will lead the Court to affirm the judgment. If the section is a jurisdictional grant only, fees were properly denied as no exception to the American Rule permits a fee award in this case. If the section is a fee-shifting statute, the district court did not abuse its discretion. The removal was reasonable and

other pertinent factors support the district court's denial of fees.

ARGUMENT

I. As Its History Shows, § 1447(c)'s Third Sentence Is Not A Fee-Shifting Statute, But Empowers District Courts To Award Fees And Costs Only When Allowed By Other Law

A. Section 1447(c)'s Predecessors Carved An Exception To The General Rule Barring Any Monetary Award When A Court Lacked Subject Matter Jurisdiction

Section 1447(c)'s third sentence is the latest version of a statute originally enacted in 1875 to empower federal courts to award costs on dismissal or remand for lack of subject matter jurisdiction. Neither § 1447(c) nor its predecessors ever stated a standard for awarding costs or fees, leaving that matter to other provisions of federal law.

Nearly from their creation, the federal courts followed the common law rule that a court without subject matter jurisdiction lacks the power to award costs or fees. "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."[2] Hence, "in all cases where the cause is dismissed [or remanded] for want of jurisdiction, no costs are allowed."[3]

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[2] *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 250 (1867).

[3] *McIver v. Wattles*, 22 U.S. (9 Wheat.) 650 (1824); *accord Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326, 330 (1925); *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896); *Hornthall v. Internal Revenue*

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In 1875, Congress enacted a large exception to this common law rule. Act of March 3, 1875, 18 Stat. 470. Section 3 ("§ 3") of the 1875 act required, for the first time, that a removing defendant post a bond "for paying all costs . . . awarded . . . if . . . such suit was wrongfully or improperly removed. . . ." 18 Stat. 471. Section 5 ("§ 5") of the same act further provided that "if, in any suit commenced in a circuit court or removed from a State court to a circuit court," the circuit court found it lacked subject matter jurisdiction, "the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it . . . , *and shall make such order as to costs as shall be just*." 18 Stat. 472 (italics added).

"[M]anifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs," these two sections for the first time conferred on federal courts the power to award costs in cases dismissed or remanded for want of subject matter jurisdiction.[4]

Over the following 75 years, the substance of §§ 3 and 5 was carried forward, with only minor amendment, in subsequent legislation affecting federal jurisdiction and removal. *See In re Northern Indiana Oil Co.*, 192 F.2d 139, 141-42 (7th Cir. 1951) (recounting subsequent history of

Collector, 76 U.S. 560, 567 (1869); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807).

[4] *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 387 (1884); *see id.* at 386 ("no want of power" to award judgment for costs); *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 926 (7th Cir. 2000) ("power conferred on circuit courts by Act of March 3, 1875 . . . to award costs . . . when remanding a suit").

§ 5). Ultimately, § 3 was recodified as 28 U.S.C. § 1446(d),[5] while § 5 was split into two sections: 28 U.S.C. § 1919, governing dismissal of actions originally filed in federal court, and 28 U.S.C. § 1447(c), governing remand to state court of removed actions.[6] In areas unaffected by these statutes, however, the common law rule retained its former vitality.[7]

Early decisions awarded costs under § 5, as a matter of course, against the party unsuccessfully invoking federal jurisdiction,[8] apparently following the common law

[5] Before its repeal in 1988, 28 U.S.C. §1446(d) provided: "Each petition for removal of a civil action or proceeding . . . shall be accompanied by a bond . . . conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

[6] Before its amendment in 1988, 28 U.S.C. §1447(c) provided, in relevant part: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, *and may order the payment of just costs*." (Emphasis added.) Though omitted from the 1948 Judicial Code, 62 Stat. 869, 939, § 1447(e), the phrase "and may order the payment of just costs" was reinserted a year later, 63 Stat. 89, 102, § 84, the House Report noting that "[t]his section also amends renumbered subsection (c) to remove any doubt that the former law authorizing the district court upon remand to order payment of costs is continued." H.R. REP. No. 81-352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268.

[7] *See, e.g., Branson v. Nott*, 62 F.3d 287, 293 (9th Cir. 1995); *Correspondent Serv. Corp. v. JVW Inv., Ltd.*, 2004 WL 2181087 at *14-16 (S.D.N.Y. 2004).

[8] *E.g., Neel v. Pennsylvania*, 157 U.S. 153, 154 (1895); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464 (1894); *Cates v. Allen*, 149 U.S. 451, 461 (1893); *Martin v. Snyder*, 148 U.S. 663, 664 (1893); *Torrence v. Shedd*, 144 U.S. 527, 533 (1892); *Graves v. Corbin*, 132 U.S. 571, 590 (1890); *see also American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 19 (1951).

rule automatically assessing costs against a losing party.[9] After the Federal Rules were adopted in 1938, merging law and equity and providing for the allowance of costs "as of course to the prevailing party unless the court otherwise directs," Fed. R. Civ. P. 54(d)(1), courts held that an award of costs on remand under § 5's successors was "discretionary rather than mandatory." *Gorman v. Abbott Labs.*, 629 F. Supp. 1196, 1204 (D. Del. 1986).

In exercising that discretion, the courts considered a variety of factors,[10] the most important of which was the strength of the removing defendant's argument for federal jurisdiction. Costs were awarded when lack of jurisdiction was or should have been obvious to the removing defendant,[11] but were denied when "nonremovability of the case

[9] *See In re Peterson*, 253 U.S. 300, 317-18 (1920). *But see Conley v. Ballinger*, 216 U.S. 84, 91 (1910) ("in view of the circumstances, it is just that the bill [in equity] should be dismissed [for lack of subject matter jurisdiction] without costs"; apparently applying rule that in equity allowance of costs was discretionary).

[10] *See, e.g., Johnson v. Smith*, 630 F. Supp. 1, 6 (N.D. Cal. 1986) (only half of costs awarded due to plaintiff's failure to seek remand); *Elsis v. Hertz Corp.*, 581 F. Supp. 604, 608 (E.D.N.Y. 1984) (costs awarded in part because eve-of-trial removal delayed litigation). Courts even awarded costs against a plaintiff whose conduct contributed to the improper removal or the case's sojourn in federal court. *See, e.g., Vaughan v. McArthur Bros. Co.*, 227 F. 364, 368 (8th Cir. 1915) (plaintiff allowed case to continue for eight years in federal court before moving to remand on ground he was a citizen of a different state than defendant alleged in the removal petition); *Duarte v. Donnelley*, 266 F. Supp. 380, 384 (D. Haw. 1967) (plaintiff alleged more than jurisdictional amount of damages, knowing losses were substantially lower); *Clark v. Safeway Stores, Inc.*, 117 F. Supp. 583, 584 (W.D. Mo. 1953) (removal proper, but case remanded after plaintiff amended to join nondiverse defendant).

[11] *E.g., Bucary v. Rothrock*, 883 F.2d 447, 449 (6th Cir. 1989); *Cornwall v. Robinson*, 654 F.2d 685, 687 (10th Cir. 1981); *Medical Legal Consulting Serv., Inc. v. Covarrubias*, 648 F. Supp. 153, 158 (D. Md.

(Continued on following page)

was not obvious,"[12] a "substantial question was presented,"[13] or the "question of removability was close and novel."[14] These holdings echo general case law under Fed. R. Civ. P. 54(d)(1), holding that costs may be denied when the case is "close and difficult" or raises novel issues.[15]

B. The 1988 Amendment To § 1447(c) Was Minor, Technical, And Not Intended To Change Prior Law

Adopted by Congress on the Judicial Conference's recommendation, the 1988 amendments to the removal statutes were intended to make only minor changes to modernize removal procedure without substantially altering prior law. The amendment to § 1447(c)'s third sentence, in particular, was intended solely to assure that despite elimination of the removal bond, district courts would retain the power to award expenses on remand.

1986); *Johnson*, 630 F. Supp. at 6; *Tralmer v. Galaxy Airlines, Inc.*, 611 F. Supp. 633, 635 (D. Nev. 1985); *Grodeck v. Jung*, 582 F. Supp. 544 (W.D. Va. 1984); *Dunkin Donuts v. Family Enter., Inc.*, 381 F. Supp. 371, 373 (D. Md. 1974).

[12] *Olsen v. Olsen*, 580 F. Supp. 1569, 1572 (N.D. Ind. 1984); *see also Lee v. Volkswagen of Am., Inc.*, 429 F. Supp. 5, 7 (W.D. Okla. 1976).

[13] *Turner v. Bell Fed. Sav. & Loan Ass'n*, 490 F. Supp. 104, 105 (N.D. Ill. 1980); *see also Gorman*, 629 F. Supp. at 1204 (costs denied; defendant "raised legitimate and substantial asseverations"); *Howard v. Group Hosp. Serv.*, 618 F. Supp. 38, 41 (W.D. Okla. 1984).

[14] *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156, 1161 (D. Md. 1978).

[15] *Association of Mexican-American Educators v. California*, 231 F.3d 572, 592 (9th Cir. 2000); *Teague v. Bakker*, 35 F.3d 978, 997 (4th Cir. 1994); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 733 (6th Cir. 1986).

1. The Removal Amendments Were A Minor, Late Addition To The Omnibus 1988 Act

Work on what ultimately became the Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, 102 Stat. 4642 ("1988 Act") began with Representative Kastenmeier's letter to the Director of the Administrative Office of the United States Courts, requesting the Judicial Conference's participation as "an affirmative contributor" in "studying the Federal judiciary to identify potentially fruitful areas for legislative improvements," including possible changes to "the remand and removal provisions of title 28."[16]

The Judicial Conference responded affirmatively, transmitting to Congress a proposed omnibus Judicial Branch Improvements Act, covering "over thirty separate subject matter areas" covering the full gamut of the judiciary's concerns from retirement pay and travel reimbursement, to jury selection, judicial immunity and disqualification, court interpreters, and court-annexed arbitration.[17]

By far, the most controversial proposal – one which the Judicial Conference had first made several years before – was to abolish diversity jurisdiction as a means of reducing federal caseloads.[18] The vast majority of the

[16] *Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 68 (1987-88) (hereinafter "*Court Reform*").

[17] *Id.* at 13-15, 17.

[18] *Id.* at 26; *see* Report of Proceedings, Jud. Conf. of U.S., 72 (Sept. 21, 1987).

hearings were devoted to that proposal. *See Court Reform*. It eventually failed to win approval. Instead, diversity jurisdiction was only modestly narrowed by raising the jurisdictional amount from $10,000 to $50,000.[19]

The proposals to amend removal procedure generated no similar controversy. They were a late addition to the bill, having been adopted by the Judicial Conference on September 21, 1987 and transmitted to Congress two days later.[20] Seen as a non-controversial response to Representative Kastenmeier's original request, the transmittal suggested only "minor changes ... for removal procedure."[21] No live testimony was offered on the removal amendments and they attracted no public comment. *See Court Reform*, vol. 2.

The Judicial Conference Committee on Court Administration's report provided the only public explanation of the removal amendments.[22] It was copied virtually verbatim into the House Report on the bill and into the Congressional Record in connection with the Senate's consideration of the measure.[23]

[19] *See* H.R. REP. NO. 100-889, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5985-86; *Court Reform*, at 26; Report of Proceedings, 72.

[20] Report of Proceedings, 71; *Court Reform*, 66-67.

[21] Report of the Jud. Conf. Comm. on Court Admin., App. I, at 4 (1987), *contained in* Report of Proceedings, at Agenda F-3; *Court Reform*, 66-67, 96.

[22] Report of the Jud. Conf. Comm. on Court Admin., at 37 & App. I (1987), *contained in* Report of Proceedings, at Agenda F-3; *Court Reform*, 93-99.

[23] H.R. REP. NO. 100-889, at 71-73 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 6031-34; 134 CONG. REC. S16,284-01 (daily ed. Oct. 14, 1988) (statement of Sen. Heflin).

2. The 1988 Amendments Preserved Prior Law On Cost Awards

Three of the changes to removal procedure that section 1016 of the 1988 Act made are pertinent here.

First, section 1016(b)(1) substituted a notice of removal signed pursuant to Fed. R. Civ. P. 11 for the former verified petition for removal. 28 U.S.C. § 1446(a). "This change," it was explained, "is in keeping with general modern distaste for verified pleading. The sanctions available under Civil Rule 11 apply to every 'other paper', but it seems desirable to make it clear that they are available in cases of improvident removal."[24]

Second, section 1016(b)(3) abolished removal bonds by repealing former 28 U.S.C. § 1446(d), the statutory successor to § 3. The House Report explains that the bond imposed "a cost that may be substantial to some litigants, and constitutes an additional procedural complication."[25]

Third, section 1016(c) amended 28 U.S.C. § 1447(c). In addition to imposing a new 30-day limit on remand motions based on procedural defects, section 1016(c) severed and expanded the former phrase "and may order the payment of just costs" into what is now the subsection's third sentence: "An order remanding the case may require payment of just costs and any actual expenses including attorney fees incurred as a result of the removal."

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[24] H.R. REP. NO. 100-889, at 71, 1988 U.S.C.C.A.N. at 6032; *Court Reform*, 96.

[25] H.R. REP. NO. 100-889, at 72, 1988 U.S.C.C.A.N. at 6033; *Court Reform*, 97.

The House Report twice explains that the reworked cost provision effected no change in existing law, but only ensured that abolition of the removal bond would not remove the federal courts' power, initially granted by the Act of March 3, 1875, to award expenses on remand.

> [T]he proposed amendment to section 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate.
>
> * * *
>
> The proposal also would amend section 1447(c) to ensure that the court may order payment of actual expense caused by an improper removal. As noted above, this provision would replace the bond provision now set out in section 1446(d), which covers payment of "all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."[26]

Like its predecessor, § 1447(c)'s new third sentence said nothing about the standard for determining when costs should be awarded. The Judicial Conference suggested no change to the then-existing standards for awarding costs on remand. Nothing in amended § 1447(c), in the House Report, or in the 1988 act's other legislative history mentions standards for awarding costs on remand or evinces any congressional intent to change prior law in that respect.

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[26] H.R. REP. NO. 100-889, at 72, 1988 U.S.C.C.A.N. at 6033; *Court Reform*, 97-98.

3. The 1988 Amendment Did Not Convert § 1447(c) Into A Fee-Shifting Statute

Since 1875, the sole function of § 1447(c) and its predecessors has been to grant federal courts power to award costs when remanding a case for lack of subject matter jurisdiction. The 1988 addition of the three words "including attorney fees" did not alter that purpose. Those words did not transform the section into a fee-shifting statute, requiring fee awards against unsuccessful removing defendants except in extraordinary circumstances, as petitioners claim. *See* Pet. Brief, 12, 24-25.

First, § 1447(c)'s new third sentence does not follow the format of any of the most common types of fee-shifting statutes. It does not authorize the court to award fees;[27] or grant fees to the plaintiff,[28] or impose fee liability on the defendant,[29] as an element of relief for a claim. Instead, § 1447(c)'s third sentence speaks to the permissible contents of a remand order: "An order remanding the case may require payment of just costs and any actual expenses

[27] These fee-shifting statutes typically follow the form: "the court, in its discretion, may allow the prevailing party . . . attorney's fees as part of costs. . . . *See, e.g.*, 15 U.S.C. §§ 77ooo(e); 77www(a); 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), 7604(d).

[28] Fee-shifting statutes of this type use the following form: "any person who shall be injured . . . by reason of anything forbidden [by federal] laws . . . shall recover . . . damages . . . , and the cost of suit, including a reasonable attorney's fee." *See, e.g.*, 11 U.S.C. § 362(h); 15 U.S.C. § 15(a).

[29] "[A]ny person who . . . fail[s] to comply [with federal law] . . . is liable to [any affected] consumer [for] . . . actual damages . . . [and] the costs of the action together with reasonable attorney's fees as determined by the court" is typical wording for this type of fee-shifting statute. *See, e.g.*, 15 U.S.C. §§ 1640(a)(3), 1679g(a)(3), 1681n(a)(3), 1681o(a)(2).

including attorney fees incurred as a result of the removal."

Second, the 1988 amendment's legislative history reveals no intent to shift attorney fees in any case remanded to state court, let alone in most or all such cases. Neither the Judicial Conference Committee report nor the House Report says a word about attorney fees. There was no public testimony on the subject. No member of the public commented on it.

Third, the legislative history's silence on the issue of attorney fees speaks volumes. Adding a fee-shifting provision to the removal statutes would effect a major change in existing law, and one likely to spark controversy. Petitioners' proposed standard for fee shifting would have been particularly controversial. Not only would it carve a large exception to the American Rule, but it would reverse pre-1988 case law under § 1447(c), punish defendants for removing in cases where this Court has declined to provide any "precise, all-embracing test" of federal jurisdiction, clash with Fed. R. Civ. P. 11 and rules of professional responsibility, and interfere with an attorney's ethical obligation to represent his or her client zealously.[30]

[30] Contrary to the pre-1988 cases cited above, see p. 11, petitioners argue fees should be awarded particularly when the question of removability is close and novel or difficult to decide, *see* Pet. Brief, 18-22, as in those areas where this Court has refrained "from stating a 'single, precise, all-embracing' test for" removal jurisdiction in federal question cases, *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, ___ U.S. ___, 125 S.Ct. 2363, 2368 (2005). Petitioners' proposed standard also clashes with Fed. R. Civ. P. 11 and rules of professional responsibility, both of which permit good faith, nonfrivolous arguments to extend, modify or reverse existing law. As those rules recognize, a lawyer owes a duty "both to his client and to the legal system, . . . to

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The Judicial Conference would certainly have recognized the controversial nature of such a change. It would not have tried to slip such a significant change through Congress under the false flag of a proposal of only "[m]inor changes . . . for removal procedure." *Court Reform*, 96. Nor would the Conference have left that far-reaching change unmentioned while detailing much less important features of the proposed amendment in its transmittal to Congress. *See Court Reform*, 95-99.

Such a significant change would most likely have encountered opposition in Congress and from the public. Yet no one said anything publicly about attorney fees in connection with the 1988 amendment to § 1447(c). As this Court said in *Fogerty*, 510 U.S. at p. 534: "we find it impossible to believe that Congress, without more, intended to adopt the British Rule. Such a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment."[31] (Citations omitted.)

Finally, a different explanation of the three added words – "including attorney fees"[32] – readily suggests

represent his client zealously within the bounds of the law," which may be ambiguous and is never static. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 & cmt. [1]; MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

[31] *See also Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) ("an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted"); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring);

[32] Apart from those words, § 1447(c)'s new third sentence is a close paraphrase of former § 1446(d)'s phrase "all costs and disbursements incurred by reason of the removal proceedings."

itself: The words "including attorney fees" were added to the sentence to make it clear that a district court had the power to award fees as well as costs upon remand, when allowed by other law. This purpose is consistent with the function § 1447(c) and its predecessors had performed since 1875.

So interpreted, the three new words effect at most a "minor change" in existing law, consistent with the Judicial Conference's representation to Congress. *Court Reform*, 96. Yet, the words still serve an important purpose. They give substance to § 1446(a)'s new, express threat of sanctions under Fed. R. Civ. P. 11 for frivolous notices of removal, granting the district court power to award the most common form of Rule 11 sanctions – attorney fees – even when the court lacked subject matter jurisdiction.[33] As a leading treatise noted at the time: "It would be desirable in some cases to tax the removing parties with an attorney's fee on the motion to remand, but an amendment of the statute probably is necessary to provide the courts with authority to do so. . . . " 14 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE, § 3739 at 587-88 (1986), *quoted in Medical Legal Consulting Serv.*, 648 F. Supp. at 158.

The three new words also resolved the lower federal courts' discord over the awardability of attorney fees under

[33] Though this Court later held that Rule 11 sanctions could be imposed though the court lacked subject matter jurisdiction, *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992), the issue was still debatable when § 1447(c) was amended in 1988. Moreover, absent the 1988 amendment, the common law rule would still bar fee awards under other statutes in cases remanded for want of subject matter jurisdiction. *See Branson*, 62 F.3d at 293; *Correspondent Serv. Corp.*, 2004 WL 2181087 at *14-16.

§ 1447(c)'s prior wording.[34] *See Barron's Educ. Series, Inc. v. Hiltzik*, 987 F. Supp. 224, 226 (E.D.N.Y. 1997).

In short, the words "including attorney fees" share the same limited purpose as the rest of § 1447(c)'s new third sentence: assuring that despite elimination of the removal bond, district courts retain the power to award costs and expenses, including fees, when remanding cases for lack of subject matter jurisdiction. After 1988 as before, § 1447(c) said nothing about the circumstances under which that power should be exercised. As to both fees and costs, it left that determination to other applicable law, such as 28 U.S.C. § 1920, Fed. R. Civ. P. 11 and 54(d), the recognized equitable exceptions to the American Rule, or other contractual or statutory fee-shifting provisions.

[34] Before the 1988 amendment, most lower federal courts held that because § 1447(c) mentioned only "costs," it did not authorize an award of attorney fees, which could be awarded only when authorized under Fed. R. Civ. P. 11 or the bad faith exception to the American Rule. *E.g., Cornwall*, 654 F.2d at 687; *Wolst v. American Airlines, Inc.*, 668 F. Supp. 1117, 1120 (N.D. Ill. 1987); *Medical Legal Consulting Serv., Inc.*, 648 F. Supp. at 158-59; *Schmidt v. Nat'l Org. for Women*, 562 F. Supp. 210, 214-15 (N.D. Fla. 1983). But a minority of district court cases held that attorney fees or at least attorney docket fees (see 28 U.S.C. § 1923) could be awarded under § 1447(c) or its predecessors. *E.g., Elba Township v. Steffenhagen*, 664 F. Supp. 1238, 1241 (E.D. Wis. 1987); *Syms, Inc. v. IBI Sec. Serv., Inc.*, 586 F. Supp. 53, 57 (S.D.N.Y. 1984); *Elsis*, 581 F. Supp. at 608; *Baas v. Elliot*, 71 F.R.D. 693, 694 (E.D.N.Y. 1976); *Kramer v. Jarvis*, 86 F. Supp. 743, 746 (D. Neb. 1949); *Pellett v. Great Northern Ry. Co.*, 105 F. 194 (C.C.D. Wash. 1900); *Josslyn v. Phillips*, 27 F. 481 (C.C.W.D. Mich. 1886).

II. Alternatively, Treated As A Fee-Shifting Statute, § 1447(c) Requires A Multi-Factor Analysis With Reasonableness Of Removal As The Primary Factor

If § 1447(c) is held to be a fee-shifting statute, the appropriate legal standard to guide the district courts in exercising their discretion to award fees under that section is a multi-factor test similar to the one this Court adopted in *Fogerty*, with the primary factor being the reasonableness of the grounds for removal. That conclusion flows from proper analysis of the "large objectives" of the pertinent statutes and the applicable equitable considerations.

A. This Court's Prior Decisions Identify The Factors Relevant To Setting The Standard For Awarding Fees Under Fee-Shifting Statutes

Piggie Park,[35] *Christiansburg Garment Co.*, *Zipes*, and *Fogerty* provide the framework for setting the standard for awarding fees under § 1447(c), if it is treated as a fee-shifting statute. That framework does not differ significantly from the Court's normal method of statutory interpretation. *See Board of Trustees v. JPR, Inc.*, 136 F.3d 794, 802 (D.C. Cir. 1998).

First, the Court looks to the statutory language and structure, similar language being a strong, but not conclusive, indication that statutes are to be treated similarly. *Fogerty*, 510 U.S. at 523; *Zipes*, 491 U.S. at 758 n.2.

[35] *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

Second, the Court reviews the statute's legislative history, searching for evidence of congressional intent. *Fogerty*, 510 U.S. at 523-24; *Christiansburg Garment Co.*, 434 U.S. at 420.

Third, the Court considers the "large objectives" of the statute. *Zipes*, 491 U.S. at 758-59. For example, in civil rights cases such as *Piggie Park, Christiansburg Garment Co.*, and *Zipes*, plaintiffs are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co.*, 434 U.S. at 418. In those cases and in other areas where Congress has enacted fee-shifting statutes "to encourage citizen enforcement of important federal policies,"[36] the Court has adopted plaintiff-friendly standards to govern fee awards.[37] Prevailing plaintiffs are entitled to fees "unless special circumstances render the award unjust." *Piggie Park*, 390 U.S. at 402. Prevailing defendants cannot recover fees unless the suit is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co.*, 434 U.S. at 421.

By contrast, when the statute pursues more complex, more measured objectives than simply encouraging private suits to enforce federal policy, the Court has adopted

[36] *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (hereinafter "*Delaware Valley*").

[37] Another critical factor in such cases is the connection between liability for violation of federal law and liability for attorney fees. *Zipes*, 491 U.S. at 762-63. Defendants who have judgments entered against them in civil rights and other similar cases are decreed to have violated federal law. Unsuccessful plaintiffs or interveners bear no such taint. Ergo, losing defendants pay fees in most cases; whereas, losing plaintiffs or interveners do not. *Id.*

a party-neutral fee award standard, based on a multi-factor analysis or relevant circumstances. *Fogerty*, 510 U.S. at 526, 534-35.

Finally, the Court's analysis has also "embrace[d] certain 'equitable considerations,'" such as whether there is typically an economic imbalance between plaintiffs and defendants that Congress meant to redress through the fee-shifting statute. *Fogerty*, 510 U.S. at 524; *Zipes*, 491 U.S. at 759.

As shown below, each step of this analysis points to the same conclusion: If it is a fee-shifting statute, § 1447(c) is most appropriately governed by a party-neutral standard, based on a consideration of multiple relevant factors.

B. Neither Statutory Language Nor Legislative History Supports A Plaintiff-Biased Fee Award Standard

Apart from the words "may" and "attorney fees," § 1447(c)'s language bears little resemblance to the wording of the civil rights statutes' fee-shifting provisions or most other fee-shifting statutes.[38] *See* p. 16 above. Hence, § 1447(c)'s wording provides no "strong indication" that it is to be interpreted like the statutes construed in *Piggie Park, Christiansburg Garment Co., Delaware Valley*, and *Zipes*. *See Fogerty*, 510 U.S. at 523. Indeed, its words "may require" and "just costs" strongly suggest that Congress granted district courts broad discretion in deciding when to award costs and fees on remand.

[38] *See also Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366-67 (7th Cir. 2000) (pointing out § 1447(c)'s "unusual" phrasing in another respect).

Petitioners wrongly claim that § 1447(c) is structurally party-biased, permitting fee awards only against defendants when a case is remanded. *See* Pet. Brief, 24-25, 31. In fact, the statute does *not* state that fee awards may be made only against defendants, but rather that the remand order may require payment of actual expenses, including attorney fees.[39] Furthermore, § 1447(c) is properly paired with § 1919, both having originated as portions of § 5. *See* pp. 8-9, above. The former authorizes awards on remand, primarily against defendants; the latter, awards on dismissal, primarily against plaintiffs. Together, the two sections form a party-neutral system.

To be sure, neither § 1447(c) nor § 1919 provides for an award when a party, plaintiff or defendant, *opposes* federal jurisdiction on frivolous grounds. In those situations, the court has subject matter jurisdiction and unquestionably may award sanctions, fees, and costs along with other appropriate relief, so neither § 1447(c) nor § 1919 need confer power to award costs or fees under those frivolously opposing federal jurisdiction.[40] Granting

[39] Both before and after the 1988 amendment, courts have awarded costs or fees on remand against plaintiffs when their conduct has led to the improvident removal or has prolonged the case's tenure in federal court. *E.g., Shrader v. Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 369-71 (E.D. Pa. 1995); *Barraclough v. ADP Automotive Claims Serv., Inc.*, 818 F. Supp. 1310, 1313 (N.D. Cal. 1993); *see also* cases cited above at p. 10, n.10. *But see Fowler v. Safeco Ins. Co.*, 915 F.2d 616, 618 (11th Cir. 1990) (§ 1447(c) allows cost awards only against removing defendants).

[40] Petitioners also vainly try to discover significance in the 1988 amendment's deletion of the word "improvidently." *See* Pet. Brief, 24. "Improvidently" previously modified both the court's obligation to remand and its power to award costs. If deleting the word expanded the courts' power to award costs, it likewise expanded their obligation to remand. Nothing in the amendment's legislative history shows any

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federal courts the power to award fees and costs when they *lack* subject matter jurisdiction historically was and still is § 1447(c)'s purpose – one it fully serves whatever standard the Court adopts for fee awards. *Compare* pp. 8-9 above *with* Pet. Brief, 25.

As already shown, the legislative history of § 1447(c) and its 1988 amendment refutes petitioners' contention that the 1988 amendment was intended either to discourage removal or to shift the plaintiff's often-substantial fees to the removing defendant in nearly all cases remanded to state court. *See* pp. 12-20 above.

The few bits of legislative history that petitioners cite for their contrary argument are drawn from the general discussion section of the 1988 House Report. Pet. Brief, 11. While those snippets show Congress was concerned that federal courts were overloaded, they do not support petitioners' notion that every section of the omnibus 1988 Act was intended to address that problem. Some of the Act's provisions – particularly, its section increasing the amount in controversy requirement for diversity cases – did attempt to restrict federal case filings, but many of the Act's 30 separate subjects bore no relation to federal caseloads. Changes in those areas were enacted for other purposes.[41]

intent to achieve either effect. Rather, the word's deletion was a non-substantive change made solely to modernize the statutory text.

[41] *See, e.g.*, Pub. L. 100-702, §§ 302 (Federal Judicial Center authorized to encourage programs relating to history of judicial branch), 701-712 (court interpreter provisions), 1003 (exemption of law clerks, magistrate judges and bankruptcy judges from federal leave act), 1005 (military retirement pay for senior and retired federal judges), 1007 (change to judicial disqualification provisions), 1008

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The 1988 amendments to the removal statutes were among the sections enacted for other purposes. They were proposed by the Judicial Conference separately from the rest of its many recommendations that were incorporated in the same act. *See* p. 13 above. The Judicial Conference's separate transmittal, later copied in the House Report on the bill, does not recommend that any removal statute be changed in order to discourage removal or to lessen federal caseloads, much less that § 1447(c) should be amended for those purposes.[42]

Silence on this point is compelling evidence, as the transmittal expressly mentioned other respects in which the proposed amendments *were* intended to slightly broaden or restrict removal jurisdiction.[43] Had the amendment to § 1447(c) been intended to staunch the flow of removals, that fact would have been mentioned as well. Petitioners' contrary argument presupposes either that the Judicial Conference did not understand its own proposal

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(incentive awards to judicial branch employees), 1017 (cost-of-living adjustments for judicial survivors' annuities), 1021 (reconfiguration of Florida districts).

[42] H.R. REP. NO. 100-889, at 71-73, 1988 U.S.C.C.A.N. at 6031-33; *Court Reform*, 95-99.

[43] The 1988 amendments slightly expanded removal diversity jurisdiction by providing that the citizenship of Doe defendants could be disregarded and by setting a 30-day limit on remand motions based on procedural defects in removal. Pub. L. 100-702, § 1016(a), (c)(1) (amending 28 U.S.C. §§ 1441(a), 1447(c)). They slightly restricted diversity removal jurisdiction by disallowing removal more than a year after an action is commenced. Pub. L. 100-702, § 1016(b)(2)(B) (amending 28 U.S.C. § 1446(a)). Each of these changes and their effect on removal jurisdiction is expressly detailed in the Judicial Conference transmittal and the House Report. H.R. REP. NO. 100-889, at 71-72, 1988 U.S.C.C.A.N. at 6032-33; *Court Reform*, 95-98. None are justified as measures to reduce federal caseloads. *Id.*

or that it purposefully misrepresented the proposal's effect in its transmittal to Congress. *See* Pet. Brief, 12. Neither hypothesis – lack of mental acuity or mendacity – is worthy of serious consideration.

Before 1988, federal courts applied a party-neutral standard under § 1447(c), using a multi-factor analysis, the principal factor being the reasonableness of the grounds for removal. *See* pp. 10-11 & nn. 10-14 above. Nothing in the 1988 amendment, the Judicial Conference's transmittal to Congress, the House Report, or any other portion of the 1988 Act's legislative history even hints at any intent to change that standard. To the contrary, the Judicial Conference assured Congress it proposed only "minor changes" in removal procedures. *Court Reform*, 96.

C. A Party-Neutral Fee Standard Best Promotes The Objectives Of Federal Jurisdiction And Removal Statutes

Like statutory language and history, statutory objectives support a party-neutral, multi-factor test for awarding fees under § 1447(c). Unlike the civil rights fee-shifting statutes, § 1447(c) was *not* enacted to promote citizen enforcement of important federal policies. Contrary to petitioners' argument, lowering federal case filings is not the sole objective of either federal jurisdiction and removal statutes generally, or § 1447(c) in particular. Rather, those statutes promote other federal policies that Congress deemed more important and that defendants may advance by removing cases to federal court.

1. Federal Jurisdiction Statutes Promote Many Important Policies Other Than Barring Federal Courthouse Doors

Like the Copyright Act examined in *Fogerty*, the statutes governing federal jurisdiction serve policies "more complex, more measured than simply [minimizing] the number of [federal] suits. . . ." *Fogerty*, 510 U.S. at 526.

This Court has repeatedly confirmed that Congress may give, withhold, restrict, or take away the jurisdiction of the lower federal courts as it sees fit.[44] So, if decreasing the flow of cases into federal courts were Congress' sole objective as petitioners claim, *see* Pet. Brief, 18-19, it could easily have achieved that goal by repealing Chapters 85 and 89 (beginning with §§ 1330 and 1441) of Title 28 and withholding any new grants of jurisdiction.

Congress has not chosen that course. Instead, it has enacted statutes granting or enlarging federal jurisdiction in order to serve a variety of other policies it deems more important. For example, 28 U.S.C. § 1343 grants federal courts jurisdiction in civil rights cases to vindicate the same anti-discrimination policy that "Congress considered of the highest priority" and also promoted by the statutes construed in *Piggie Park, Christiansburg Garment Co., Delaware Valley* and *Zipes*.[45]

[44] *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1872); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

[45] *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-45 (1972). Congress enacted § 1343's predecessor to enlarge federal jurisdiction so federal courts could enforce rights, newly protected by the Fourteenth Amendment, which the state courts were not adequately vindicating.

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So, too, what is now 28 U.S.C. § 1331 (federal question jurisdiction) was originally enacted as § 1 of the Act of March 3, 1875, as a deliberate "expansion of national authority over matters that, before the Civil War, had been left to the States." *Lynch*, 405 U.S. at 548. The advantages of "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues" override concern about federal caseloads. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2367. As originally enacted, § 1331 contained an amount-in-controversy requirement in order "to reduce congestion in the federal courts." *Lynch*, 405 U.S. at 549; 18 Stat. 470. That requirement was repealed in 1980, Congress deeming it more important that "federal courts should bear the responsibility of deciding all questions of federal law" than that the federal caseload be reduced.[46]

The other statutes granting federal courts jurisdiction also serve purposes sufficiently important that Congress has enacted and retained them despite the fact they increase federal courts' work. *See, e.g.*, 28 U.S.C. §§ 1330 (suits against foreign sovereigns),[47] 1334 (bankruptcy cases),[48] 1338 (patent, copyright, trademark and unfair

See Monroe v. Pape, 365 U.S. 167, 173-74 (1961), *overruled on other grounds by Monell v. Dept. of Social Services*, 436 U.S. 658, 663 (1978).

[46] Pub. L. 96-486, § 2(a), 94 Stat. 2369; H.R. REP. NO. 96-1461, at 1-2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5063, 5063-64.

[47] *See* H.R. REP. NO. 94-1487, at 12-13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 489-91 (1983).

[48] *See* H.R. REP. NO. 95-595, at 43-52 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6005-13.

competition cases),[49] 1340 (internal revenue cases), 1344 (federal election cases), 1345, 1346 (cases in which the United States is a party), and 1358 (federal eminent domain cases).

Diversity jurisdiction, too, serves important policies that led the Framers to give it constitutional stature, U.S. Const., art. III, § 2, and have not only prevented its abolition, despite the Judicial Conference's repeated recommendations, but triggered its resurgence and expansion in specific types of complex litigation. *E.g.*, 28 U.S.C. §§ 1332(d) (class and mass actions),[50] 1335 (interpleader),[51] 1367 (supplemental jurisdiction),[52] 1369 (multiparty, multiforum mass accident cases).[53]

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[49] *See Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 543-44 (2d Cir. 1956); Reviser's Notes to 28 U.S.C.A. § 1338(b), 1948 Revision of Judicial Code.

[50] *See* S. REP. NO. 109-14, at 4-6, 8-14, 22-27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5-7, 9-15, 23-27.

[51] This section originated in the Act of Feb. 22, 1917, ch. 113, 39 Stat. 929, which was adopted in reaction to *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). The section gives stakeholders federal recourse from potentially conflicting decrees of different states' courts. *See* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 8 (1986).

[52] *Exxon Mobil Corp.*, 125 S.Ct. at 2618 (purpose of diversity jurisdiction "is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants").

[53] *See* H.R. CONF. REP. NO. 107-685, at 199-202 (2002), *reprinted in* 2003 U.S.C.C.A.N. 1120, 1151-54.

2. Federal Removal Statutes, Including § 1447, Were Not Enacted To Discourage Resort To Federal Court

Focusing more narrowly on federal removal statutes, and still more specifically on § 1447(c) and its amendment in 1988, the Court will reach the same conclusion. Reducing congestion in federal courts is not these statutes' primary objective. They serve other federal policies that Congress has deemed important enough to justify opening a federal forum to those initially sued in state court.

> [T]he right of removal probably was designed [originally] to protect nonresidents from the local prejudices of state courts. The rather limited right to remove given in 1789 to aliens and nonresident defendants was expanded by a series of statutes, a great many of which were enacted in the aftermath of the Civil War. These culminated in 1875 in legislation [Act of March 3, 1875, § 2; 18 Stat. 470] that permitted removal, subject only to the then-required jurisdictional amount of $500, of virtually all cases within the constitutionally apportioned judicial power of the federal courts.[54]

Though somewhat restricted in 1887,[55] broad removal jurisdiction has remained a key component of federal practice ever since, extending to all cases over which the federal courts might exercise original jurisdiction "[e]xcept

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[54] 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (3d ed. 2004) (fns. omitted).

[55] Act of March 3, 1887, 24 Stat. 552, corrected by Act of August 13, 1888, 25 Stat. 433.

as otherwise expressly provided by Act of Congress. . . ."[56] As the Class Action Fairness Act of 2005 reminds, removal jurisdiction continues to serve federal policies that Congress deems of greater importance than lessening federal courts' workload.[57] *See also Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2367-68.

Nor is it § 1447(c)'s objective to deter defendants from removing cases to federal court. Rather, since the original enactment of its predecessor in 1875, that provision's function has been to empower federal courts to award costs when they lacked subject matter jurisdiction, contrary to the common-law rule. *See* pp. 8-9 above. As already seen, neither the 1988 amendment's text nor its legislative history indicates any intention to turn away from that historical purpose or to transform § 1447(c) into an anti-removal in terrorem clause. *See* pp. 12-20 above.

Moreover, it is improbable that the Judicial Conference would have proposed, or that Congress would have accepted, shifting fees on remand as a means to reduce federal litigation. Shifting fees at best would have only a minimal effect on federal case filings.[58] Had the goal been

[56] 28 U.S.C. § 1441(a); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003).

[57] *See* S. REP. NO. 109-14, at 9, 22-27, 48-50, 2005 U.S.C.C.A.N. at 10, 22-27, 45-47.

[58] In 2004, 34,443 cases were removed to federal court, accounting for only 12.2% of new federal civil cases. LEONIDAS R. MECHAM, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, table S-7. There are no published statistics on remands, but they doubtless constitute well fewer than half of all removals. At best, shifting fees on remand might deter the filing of some percentage of those unsuccessful removals, decreasing total federal civil filings by an imperceptible amount, most likely substantially less than 5%.

to decrease federal caseloads, the Judicial Conference and Congress would surely have chosen more effective means, such as abolishing diversity jurisdiction – a measure actually proposed to achieve that goal, but one which failed to secure congressional approval.

In short, the statutes governing federal jurisdiction and removal generally and § 1447, in particular, serve a variety of federal policies Congress deemed more important than simply minimizing the number of cases in federal court. Petitioners' suggestion that § 1447(c) was amended in 1988 in order to deter defendants from removing cases from state court finds no support in the amendment's legislative history or elsewhere.

D. Equitable Considerations Also Favor A Party-Neutral Standard

1. State Court Plaintiffs Vindicate No Congressional Policy, Though Removing Defendants May Do So

Unlike those who bring civil rights actions, plaintiffs whose cases are remanded to state court cannot claim to be "the chosen instrument of Congress." They do not enforce federal law; otherwise, their suits would not be remanded, except perhaps for procedural defects in removal. 28 U.S.C. §§ 1331, 1441(a). By pursuing state law claims, these plaintiffs effectuate no federal policy, least of all any "that Congress considered of the highest priority." *Christiansburg Garment Co.*, 434 U.S. at 418.

By contrast, a defendant may vindicate important federal policies by removing a state court case to federal court. For example, removal of a case wholly preempted by federal law may prevent state law from interfering with

Congress' regulation of vital segments of the national economy. *See, e.g., Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003). Removal may allow a federal forum for decision of important issues of federal law or vindication of federal agencies' actions. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2367-68. Bankruptcy removals promote the goal of unifying resolution and administration of bankruptcy matters in a single court system. Removal of mass accident cases and now nationwide class actions furthers other important federal concerns.

Of course, no federal policy is advanced by an *unsuccessful* attempt to remove a case. But that is not the relevant inquiry. *See* Pet. Brief, 18, 23, 31. Rather, the issue is whether Congress chose to discourage even meritorious removals by imposing liability for plaintiffs' attorney fees as the price of failure. It did not. To paraphrase *Fogerty*, 510 U.S. at 527:

> Because [removal] law ultimately serves the purpose of [advancing important federal policies] through access to [federal court], it is peculiarly important that the boundaries of [removal] law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious [grounds for removal] should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims [for remand].

2. An Unsuccessful Removal Is No Violation Of Federal Law

This Court's "cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting

statutes." *Zipes*, 491 U.S. at 762. Defendants who remove cases on tenable, but ultimately unavailing, grounds are like the intervenors in *Zipes*. They have not violated any federal statute or infringed on anyone's federally protected rights.

The distinction "between wrongdoers and the blameless" is crucial as "fee liability and merits liability run together." *Zipes*, 491 U.S. at 763. An order remanding a case to state court does not hold the defendant liable on the merits. The defendant may well prevail on the merits in state court after remand, even on a federal preemption defense first raised unsuccessfully as a ground for removal under the complete preemption or artful pleading doctrines.[59]

3. There Is No Economic Imbalance Between State Court Plaintiffs And Removing Defendants

In civil rights and other statutes, Congress has enacted fee-shifting provisions to redress a perceived economic imbalance between plaintiffs and defendants. *Fogerty*, 510 U.S. at 524. No such imbalance exists between state court plaintiffs and removing defendants. Rather, both sides in removed cases "can run the gamut from corporate behemoths to starving artists." *Id.*; *see, e.g., Topeka Housing Auth. v. Johnson*, 404 F.3d 1245 (10th Cir. 2005) (corporate plaintiff; pro se removing defendant);

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[59] *See, e.g., McIntosh v. Atchison, T. & S. F. Ry. Co.*, 19 Kan. App. 2d 814, 877 P.2d 11 (Kan. App. 1994); *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 258 Cal. Rptr. 647 (1989).

Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290 (5th Cir. 2000) (reverse alignment).[60]

In a civil rights suit vindicating dignitary interests, non-monetary relief, such as an injunction, is often the primary or only remedy available. Fee-shifting in these cases is particularly important to overcome the otherwise substantial financial disincentive to sue. *Piggie Park*, 390 U.S. at 402. There is no similar disincentive to sue when the underlying statute protects economic, not dignitary, interests. Therefore, "[i]n general, statutes protecting economic interests that contain fee-shifting provisions vesting discretion in the district court do not create a presumption that a prevailing party will be awarded fees." *Eddy v. Colonial Life Ins. Co.*, 59 F.3d 201, 205 (D.C. Cir. 1995). Only economic, not dignitary, interests are protected by § 1447(c).

Also, plaintiffs are as likely to engage in disreputable practices in efforts to avoid removal as defendants are to attempt removal of cases in which the federal courts clearly lack jurisdiction. *E.g., Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907); *In re Diet Drugs Prod. Liab. Litig.*, 220 F. Supp. 2d 414, 420-25 (E.D. Pa. 2002). An even-handed standard for cost and fee awards best remedies abuses on both sides.

[60] Petitioners' assertion that "in our experience" most removals are by corporations in suits brought by individuals, *see* Pet. Brief, 33, provides no sound basis for concluding that Congress perceived any economic imbalance between state court plaintiffs and removing defendants or amended § 1447(c) to redress it. Petitioners' necessarily limited experience is not statistically significant and was not disclosed to Congress in 1988.

4. To Remove, Defendants Must Act Quickly, Without Discovery, When Facts Or Law Or Both Are Uncertain

Another pertinent equitable factor is the removing defendant's uniquely disadvantageous position. A defendant has only 30 days in which to exercise or waive its right to remove. 28 U.S.C. § 1446(b). In that short period, it must find the facts, determine the applicable law, and persuade any co-defendants to join it.

Determining the facts is often difficult as many facts on which removal jurisdiction may depend are not known or readily available to the defendant. For example, the complaint is often silent, ambiguous or confusing as to the amount in controversy. *See, e.g.*, JA 9-33, 35, 42-43, 58-60. Under most states' procedures, there will be insufficient time to conduct discovery before the notice of removal must be filed. In many cases, the defendant is forced to make its best judgment quickly based on limited information. The defendant's task may be particularly difficult when the plaintiff has fraudulently joined nondiverse parties or engaged in other improper tactics to avoid removal. *See, e.g., McKinney v. Board of Trustees*, 955 F.2d 924, 927-28 (4th Cir. 1992); *In re Diet Drugs Prod. Liab. Litig.*, 220 F. Supp. 2d at 420-25.

Adding to the uncertainty, there are many areas of federal jurisdiction where the law is unclear[61] or lower

[61] As the lower courts found in this case, federal jurisdictional law was unclear in at least two critical areas when this case was removed. *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir. 2004); Pet. 7a-13a. Other areas of uncertainty abound with respect to long-standing jurisdictional statutes, let alone with respect to new ones like 28 U.S.C. § 1332(d). Just last term, this Court acknowledged that it has

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court decisions are in conflict.[62] Consequently, a removing defendant often finds itself as uncertain about what law will be applied as it is about what the facts are. Where such uncertainty abounds, it is inequitable to impose fees on a defendant that makes a good faith, reasonable effort to determine the applicable law and facts, but in hindsight is held wrong.[63]

In short, all of the factors this Court has considered significant in determining the standard for awards under fee-shifting statutes counsel against adopting any categorical rule requiring or banning attorney fee awards on remand in all but exceptional cases. If treated as a fee-shifting

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refrained from adopting any "single, precise, all-embracing test" for removal in federal question cases. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2368, 2372 (Thomas, J., concurring).

[62] Just last term, this Court resolved the long-enduring conflict over the scope of supplemental jurisdiction, see *Exxon Mobil Corp.*, 125 S.Ct. at 2618, but many other conflicts remain to complicate a removing defendant's task. *Compare McKinney*, 955 F.2d at 926-27 (each later-served defendant may remove within 30 days after service on it) *with Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986) (removal period ends 30 days after service on first defendant). *See also Adams v. Charter Communications VII, LLC*, 356 F. Supp. 2d 1268, 1272-73 (M.D. Ala. 2005) (adopting later rule after noting the 11th Circuit has not decided the issue).

[63] Petitioners wrongly argue that a defendant should never remove unless it is certain the case is removable because all doubts are resolved against retaining the case in federal court. *See* Pet. Brief, 21. The rule petitioners cite applies only if doubt remains after the jurisdictional facts and law are fully litigated. It does not apply to the necessarily doubt-laden circumstances under which most defendants must decide, at their peril, whether to remove. Nor is there any authority for petitioners' assertion that this rule bars a defendant from removing on new or novel legal theories. *Id.* at 22. By that mistaken theory, no defendant should ever invoke the newly enacted 28 U.S.C. §§ 1332(d), 1453, as they create "new law" "expand[ing] federal jurisdiction beyond its traditional limits." *Id.*

statute, § 1447(c)'s third sentence should be read, as in *Fogerty*, to require a party-neutral test based on a multi-factor analysis.

E. The Party-Neutral Multi-Factor Test Applied By Most Lower Federal Courts Is The Appropriate Standard For Awarding Fees Under § 1447(c)

Consistent with settled pre-1988 case law as well as most post-1988 decisions,[64] a party-neutral, multi-factor test should govern awards under § 1447(c).

The most important factor in that analysis should be "the nature of the defect in the attempted removal and where the defendant's erroneous action seems to fall on a spectrum running from reasonable to frivolous."[65] An award is appropriate when non-removability should have been obvious.[66]

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[64] Of the Courts of Appeals, only the Seventh Circuit appears to have adopted a standard that favors plaintiffs. The Seventh Circuit's "presumption" that the plaintiff is entitled to fees on remand is based on a misreading of its own prior decision that presumed entitlement to fees on appeal once fees were awarded in the district court, not entitlement to fees in the district court. *See Sirotzsky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir. 2003) (*citing Garbie v. Daimler-Chrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000)); *see also* Pet. Brief, 16.

[65] 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3739 (3d ed. 2004); *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004) (We "consider the objective validity of the removing party's efforts, at the time that party attempted to remove the case."); *Daleske v. Fairfield Communications, Inc.*, 17 F.3d 321, 324 (10th Cir. 1994) ("propriety of the defendant's removal continues to be central"); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (same).

[66] *Hart v. Wal-Mart Stores, Inc. Associates' Health & Welfare Plan*, 360 F.3d 674, 679-81 (7th Cir. 2004); *Hofler v. Aetna US Healthcare of*

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Conversely, no award should be made if the case was properly removed but is later remanded, in whole or in part, in the district court's discretion – as under 28 U.S.C. §§ 1332(d)(3), (4), 1334(c), or 1367(c) – or due to later developments.[67]

Cases lying between these extremes call for careful weighing of the reasonableness of the grounds for removal. In general, when the removing defendant advances reasonably debatable grounds for removal, costs and fees should be denied, particularly if the grounds for removal are novel or raise difficult jurisdictional issues.[68]

The decision to award fees or costs in particular cases may also properly be influenced by such other factors as:

Cal., Inc., 296 F.3d 764, 770 (9th Cir. 2002); *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587-88 (5th Cir. 2001); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352-53 (10th Cir. 1997); *Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1261 (3d Cir. 1996).

[67] No costs or fees should be awarded, for example, when the district court exercises its discretion to remand state-law claims after dismissing the federal-law claims on which removal was based, or remands after allowing the plaintiff to join a new defendant who destroys diversity or to amend to disclaim damages over the jurisdictional amount. *See, e.g., Jeffrey v. Cross Country Bank*, 131 F. Supp. 2d 1067, 1070 (E.D. Wis. 2001).

[68] *Martin*, 393 F.3d at 1148-51; Pet. 6a-13a; *Roxbury Condominium Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 228 (3d Cir. 2003); *Valdes*, 199 F.3d at 293-94; *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996); *Virgin Islands Housing Auth. v. Coastal Gen. Constr. Serv. Corp.*, 27 F.3d 911, 917 (3d Cir. 1994). A fruitful analogy may be drawn to the body of case law determining whether "the position of the [United States] was substantially justified" for purposes of fee awards under 28 U.S.C. § 2412(d). *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 564-66 (1988).

- Whether the plaintiff is partly responsible for the removal, for the case's remaining in federal court, or for altering the case after removal to precipitate a remand.[69]
- Whether the defendant failed to notify the court of developments depriving it of jurisdiction[70] or engaged in other inequitable or improper conduct.[71]
- Whether a party is a pro se litigant or lacks the financial ability to bear an award of costs or fees.[72]
- Whether a cost or fee award is fair "overall . . . given the nature of the case, the circumstances of the remand, and the effect on the parties."[73]

[69] *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32-33 (5th Cir. 1997); *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490-91 (9th Cir. 1995); *Bankston v. Burch*, 27 F.3d 164, 169 (5th Cir. 1994); *Miranti*, 3 F.3d at 929; *see also Kunica v. St. Jean Fin., Inc.*, 63 F. Supp. 2d 342, 352 (S.D.N.Y. 1999).

[70] *See Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 924 (2d Cir. 1992).

[71] *See Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) (defendant refused request to remand, though acknowledging that court would likely order remand); *Elsis*, 581 F. Supp. at 608 (eve-of-trial removal without co-defendants' consent delayed timely litigation of case).

[72] *See, e.g., City of Superior v. Anderson*, 1995 WL 861008 at *2 (D. Minn. 1995) (denying fees against pro se defendant); *see also Topeka Housing Auth.*, 404 F.3d at 1248 (noting that pro se status does not prevent a fee award, but affirming award of only $500, much less than the actual fees plaintiff incurred).

[73] *Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993); *Morgan Guar. Trust Co.*, 971 F.2d at 924.

III. The District Court Properly Denied Petitioners' Fee Request

The judgment denying petitioners' request for fees should be affirmed under either interpretation of § 1447(c) stated above.

If the section empowers district courts to award fees only when other law permits, petitioners were properly denied fees, as they did not try to show that a fee award was permitted by any law other than § 1447(c). The district court's factual findings preclude any award under Fed. R. Civ. P. 11 or the equitable bad faith, vexatious litigant exception to the American Rule. See Pet. 17a-20a. No other statutory or equitable basis for a fee award appears applicable here.

Alternatively, treating § 1447(c) as a fee-shifting statute, the judgment should be affirmed. Fees were properly denied under a party-neutral, multi-factor test similar to the one suggested above. Addressing the primary factor under that test, both lower courts found that defendants had objectively reasonable grounds for believing removal was proper based on unsettled and developing law.[74] Pet. 7a-13a, 17a-20a.

Proving the same point, the district court concluded that removal was proper and thereafter found there was "no substantial ground for difference of opinion" on that issue. JA 42-43, 46-49. Plaintiffs, themselves, considered the removal proper at the outset, changing their mind only

[74] The lower courts' finding in this case is consistent with *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1252 (D. Ariz. 1996) which denied a fee award under § 1447(c) for the same reason: the unsettled state of the law regarding aggregation of punitive damages in a class action to meet the amount in controversy requirement.

when the district court disclosed its intention to rule against them on the merits.[75] JA 38-41.

Even though neither lower court made express findings on other relevant factors, the judgment should be affirmed. Petitioners never suggested any other relevant factor weighed in their favor. Indeed, the only other factor applicable to this case supports denial of fees: Petitioners were partially to blame for the removal, due to their complaint's unclear allegations regarding the amounts they sought and their feigned ignorance of the falsity of their allegation they had paid the collateral protection insurance premium. *See* JA 39; *compare* JA 42-43 *with* JA 59-60. Plaintiffs were also responsible for the case's prolonged sojourn in federal court, having waited a year after removal before first raising any question as to subject matter jurisdiction. *Compare* JA 1 item #1 *with* JA 38.

Reversal would be appropriate in this case *only* if the Court adopted petitioners' erroneous notion that plaintiffs should be awarded fees on remand in almost every case, especially when the defendant advances a novel theory or unsuccessfully attempts to make new law expanding the boundaries of federal removal jurisdiction. *See* Pet. Brief, 17-23.

As already shown, nothing in § 1447(c), its legislative history, its larger objectives, or relevant equitable considerations supports such a standard. Nor do any of the hundreds of published lower court decisions on fee awards

[75] *See Moline Mach., Ltd. v. Pillsbury Co.*, 259 F. Supp. 2d 892, 905-06 (D. Minn. 2003) (fees denied: "the basis for the removal was sufficiently compelling that the Plaintiff did not mount any effort toward remand until late in the pretrial process"); *Heichman v. American Tel. & Tel. Co.*, 943 F. Supp. 1212, 1222 (S.D. Cal. 1995) (fees denied: "plaintiff appeared to accept this Court's jurisdiction for a time and only changed his mind, possibly for strategic reasons").

under § 1447(c). To the contrary, many have expressly rejected petitioners' proposed test, holding that fees should *not* be awarded when the defendant had an objectively reasonable ground for believing that removal was proper – particularly when that belief is based on unsettled, unclear, complex, or developing law on jurisdictional issues.[76]

Adopting petitioners' proposed standard would overturn the settled law of every circuit but the Seventh – each of which has adopted a party-neutral, multi-factor test – and would stultify the law on federal removal jurisdiction, deterring defendants from seeking healthy change or clarification in a complex system of laws Congress enacted for reasons other than simply barring the doors to federal courthouses.[77]

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[76] *Martin*, 393 F.3d at 1151 (denial of fees no abuse of discretion "[g]iven the uncertain state of the law on aggregation of punitive damages"); *Roxbury Condominium Ass'n, Inc.*, 316 F.3d at 228 (fees not awardable when defendant has "colorable removal claim in an area of unsettled law"); *Valdes*, 199 F.3d at 293-94 (state law on viability of claim against non-diverse defendant only clarified by post-removal decision); *Virgin Islands Housing Auth.*, 27 F.3d at 917 (jurisdictional issue clarified only by post-removal decision); *see also* authorities cited at Ans. to Cert. Pet., 10-11, n.18.

[77] However desirable it may seem to make jurisdiction "as self-regulated as breathing," see Pet. Brief, 20, federal jurisdiction is, in fact, a highly complex area, made more so by intricate, complicated jurisdictional grants, such as 28 U.S.C. § 1332(d), and by this Court's refusal to adopt "precise, [and] all-embracing" jurisdictional tests. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2368, 2372 (Thomas, J., concurring). The complexities of federal jurisdiction will not vanish if attorney fees are nearly always awarded on remand, nor is there any evidence Congress intended to achieve simplification by that indirect means. Instead, adopting petitioners' proposed standard may deter defendants in the future from removing in cases like *Beneficial Nat. Bank* and *Grable & Sons*, making it more difficult for this Court to chart the contours of federal jurisdiction.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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No. 04-1140

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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This brief is filed on behalf of the Product Liability Advisory Council, Inc. as *amicus curiae* in support of Respondents, with the written consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with more than 120 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals and medical devices.[2] PLAC's primary purpose is to file amicus curiae briefs in cases raising issues that affect the development of products liability law and that have the potential to affect PLAC's members. PLAC has submitted hundreds of amicus briefs in state and federal appellate courts, including this Court.

The members of PLAC have a significant interest in the principles relating to the removal of state court actions to federal courts. In recent years, PLAC members have been named as defendants in numerous state court actions, particularly in mass tort product liability cases. They have gained first-hand experience with devices used by the plaintiffs' bar in an effort to block defendants' removal of those actions to federal court based on diversity jurisdiction

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[1] Copies of those consents have been filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] A list of PLAC's current corporate membership is included as Appendix A to this brief.

under the provisions of 28 U.S.C. § 1441(a). PLAC's members have a particular interest in retaining the right to challenge plaintiffs' improper devices and strategies to block the appropriate exercise of defendants' statutory removal rights, without the threat of being sanctioned if they are not able to establish the impropriety of those devices and strategies.

SUMMARY OF ARGUMENT

Petitioners argue that this Court should adopt a novel standard, tilted toward plaintiffs, for implementing the costs and fees provision of the removal statute. This extraordinary approach – reading the word "may" in the statute to mean "shall" – is necessary, Petitioners claim, to carry out the intent of Congress, to fulfill the "large objectives" of the removal statute and to satisfy "equitable considerations." Respondents have already refuted Petitioners' arguments concerning Congress' intent in amending that provision of the removal statute. Respondents have also demonstrated that, to the extent the "large objectives" of the removal statute and "equitable considerations" bear upon the standard for awarding fees under that provision, those factors favor the party-neutral, multi-factor analysis applied by the lower courts in this case.

As to "large objectives," a central purpose of the removal statute since the dawn of the Republic has been to extend the protection of diversity jurisdiction to defendants sued outside their home state. Petitioners emphasize the purposes of the limitations on removal, but those limitations are subsidiary to this overriding objective of the statute: to provide a neutral forum to such defendants. To that end, this Court and the other federal courts have vigilantly protected

defendants against abusive practices by plaintiffs designed to frustrate the right of removal.

As to the appropriate equitable considerations in establishing a standard for fee awards, one of the most crucial is the development and proliferation of stratagems to manipulate federal jurisdiction and defeat defendants' removal rights. These devices are often difficult for defendants to overcome at the opening stages of a litigation. The law is often uncertain. The approaches of the lower courts vary. And the record is often undeveloped. But it is not improper for defendants to try, so long as they have a reasonable basis for such challenges. To over-deter them would be to reward manipulative conduct by some plaintiffs and to undercut the central goal of the removal statute. Equity is best served under these circumstances, not by adopting a rule tilted toward plaintiffs, but by leaving to the discretion of the district judge the determination, based on neutral factors, whether to award fees under the specific facts before the court. The most important factors in determining whether fees should be awarded should be the nature of the strategic obstacle to removal being challenged, the plaintiff's apparent intent in erecting the obstacle and the reasonableness of the defendants' challenge, even if unsuccessful.

As to the intent of Congress, there is no indication from any source that Congress intended to grant defendants removal rights while subjecting them to sanctions for reasonable, but unsuccessful efforts to exercise those rights.

ARGUMENT

I. THE OVERRIDING OBJECTIVE OF THE REMOVAL STATUTE IS TO EXTEND TO DEFENDANTS THE PROTECTION OF A NEUTRAL FORUM BASED ON DIVERSITY JURISDICTION AS AN ALTERNATIVE TO THE POTENTIALLY BIASED STATE COURT FORUMS SELECTED BY PLAINTIFFS

The Constitution provided for diversity jurisdiction of the federal courts, and the very first Congress implemented it in the Judiciary Act of 1789. As this Court explained just last Term, "the purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980) ("'[D]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.'") (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938)); *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 150 (1965) (Diversity jurisdiction provides "protection of the nonresident litigant from local prejudice."). The diversity jurisdiction clause also reflects a concern, of particular relevance to present-day suits against out-of-state corporations, "that state courts might discriminate against interstate businesses and commercial activities." It was therefore viewed "as a means of ensuring the protection of interstate commerce."[3]

[3] S. REP. No. 109-14, at 8 (2005) (report accompanying The Class Action Fairness Act of 2005). That report cited, among other scholars, Henry J. Friendly, subsequently an eminent judge of the (Cont'd)

Since first implementing the diversity jurisdiction authorized by Article III, Congress has also allowed defendants the right to remove to federal court certain cases brought against them in state courts. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (providing for removal when the amount in controversy exceeded $500 and the defendant was a citizen of a different state). Petitioners' rendition of the objectives of statutory removal rights is unbalanced and myopic. The overriding purpose of the creation of removal rights was to extend the protection of diversity jurisdiction to defendants. *See* Erwin Chemerinsky, FEDERAL JURISDICTION § 5.5 (4th ed. 2003). Because plaintiffs select the forum in the first instance, they do not need a right of removal to invoke diversity jurisdiction. Unless defendants could remove, diversity would protect *only* plaintiffs. Even wholly diverse out-of-state defendants would always be forced to litigate in the state courts of plaintiffs' choice. To be sure, defendants' removal rights are subject to limitations, but those limitations do not displace the overriding objective of the removal statute to provide such protection to defendants.

Accordingly, this Court has long been vigilant in protecting defendants' removal rights against abusive practices designed to frustrate those rights. *See, e.g., Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92, 102 (1898) (in suit against diverse railway and non-diverse local employees, court permitted belated removal when employees were

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Second Circuit Court of Appeals. In an examination of the reasons for the grant of diversity jurisdiction, he found a "principal reason" to have been a "desire to protect creditors against [state] legislation favorable to debtors." Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483, 496-97 (1928).

dismissed from the action at trial); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907) (ignoring non-diverse defendant's citizenship when joined for the purpose of preventing exercise of right of removal and without a factual basis); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (same). As this Court admonished nearly 100 years ago in *Wecker*, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." 204 U.S. at 186.

There is, if anything, greater need for such vigilance now than in 1907. Indeed, the recent echoes in federal courts of *Wecker's* call for scrutiny reflect the increased salience of the concern. The Court of Appeals for the Fourth Circuit, for example, observed that "Congress created the removal process to protect defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992).[4] Congress recognized the need for protecting defendants' right to a neutral federal forum in interstate class action litigation earlier this year by its enactment of "The Class Action

[4] *See also Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427 (5th Cir. 2003) ("Congress may have intended to limit diversity jurisdiction [by time limits reducing the opportunity for removal after substantial progress had been made in state court], but it did not intend to allow plaintiffs to circumvent it altogether."); *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425 (E.D. Pa. 2002) ("As long as Congress authorizes the federal district courts to exercise subject matter jurisdiction over diversity actions we must protect the right of parties to invoke it.").

Fairness Act of 2005." Pub. L. No. 109-2, 119 Stat. 4. That Act extended protection for defendants in such actions, following extensive hearings into plaintiffs' lawyers' "gam[ing]" procedural rules to keep interstate class actions in state courts. *See* S. REP. No. 109-14, at 4, 10. The same "gaming" occurs in non-class action litigation against interstate businesses, as discussed below. The explosion of mass tort litigation has increased defendants' need for a neutral federal forum.

II. A REMOVAL BASED ON REASONABLE, BUT ULTIMATELY UNSUCCESSFUL, GROUNDS DOES NOT, WITHOUT MORE, JUSTIFY SANCTIONS

Petitioners assume that a remand of a removed case means the defendant somehow acted improperly or contravened Congress's intent in removing the case, even if the removal rested on reasonable grounds. *See* Pet. Br. at § IV.A. Not only is that assertion unfounded, but it also would subvert the central function of the removal statutes. As the American Law Institute recently stated, "[c]urrent law invites contrivance to frustrate defendants' legitimate rights of removal by a variety of stratagems . . . ." American Law Institute, FEDERAL JUDICIAL CODE REVISION PROJECT 466 (2004). We discuss below a sample of some of those contrivances and the challenges they pose to the appropriate exercise of removal rights. Even these few samples, however, demonstrate that Petitioners' interpretation of the fee award provision of the removal statute would vitiate the removal rights that Congress granted.[5]

[5] These examples are drawn primarily from diversity jurisdiction removals, because removals on that basis arise most often in product

(Cont'd)

A. Plaintiffs Are Devising Novel Strategies to Block Removal and Defendants Are Responding Appropriately by Urging the Courts to Evolve Existing Principles to Address Those New Strategies

Petitioners argue that defendants should not remove cases based on "novel contentions." If that were the rule, however, defendants could not respond to new strategies to block their right of removal. The law is not static. As Justice Holmes observed, the life of the law is experience. Legal standards must adapt to the innovations of thousands of practitioners plying their ingenuity on behalf of their clients. Not only is there nothing improper in defendants' urging courts to extend established principles to plaintiffs' latest devices to block removal, such advocacy is essential. As this Court explained more than 100 years ago, it is sometimes necessary for the court to develop new interpretations of removal law to "prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control." *Powers*, 169 U.S. at 100.

One example of such a new device used in mass tort cases to block federal court jurisdiction is the filing of mass complaints, joining – or more aptly misjoining – numerous plaintiffs diverse from defendants, whose claims could therefore be removed to federal court if filed individually, with at least one plaintiff who is not diverse from at least

(Cont'd)
liability litigation. We do not mean to suggest that there are not similar issues arising in connection with removals based on federal question jurisdiction.

one defendant. This device multiplies the effect on removability of one non-diverse plaintiff, using that lack of diversity to insulate potentially thousands of other plaintiffs against removal. *See Allapattah*, 125 S. Ct. at 2617 (diversity jurisdiction requires that all plaintiffs be diverse from all defendants). In product liability litigation involving silica, for example, up to 4,280 plaintiffs joined in a single complaint filed in a Mississippi state court, with at least one plaintiff having the same citizenship as at least one defendant. *See In re Silica Prods. Liab. Litig.*, 2005 WL 1593936, at *74-*75 (S.D. Tex. June 30, 2005). In product liability litigation involving the diet drugs sometimes known as "fen-phen," 168 cases were filed in a Georgia municipal court on behalf of more than 14,000 plaintiffs residing throughout the nation. In each case, only one or two plaintiffs were Georgia residents and no more than a handful of plaintiffs lacked citizenship diverse from that of any defendant. *See In re Fen-Phen Litig.*, No. 1:03-MD-1-RLV, slip op. at 2 (N.D. Ga. Oct. 15, 2003).[6] In response to this new strategy, defendants have properly argued that plaintiffs have invented a new form of fraudulent joinder, just as inappropriate as plaintiffs' fraudulently joining non-diverse defendants against whom plaintiffs have no intention of seeking a recovery or no valid claim. *See Chicago, Rock Island, & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) ("fraudulent joinder" of a defendant is found either when there is no real intention to get a joint judgment or when there is no colorable ground for such a judgment).

A number of courts have accepted that argument, and this removal-blocking device has come to be known as

[6] Unpublished decisions cited in this brief will be provided upon the request of the Court.

"fraudulent misjoinder."[7] Not every court, however, has recognized this device as a form of fraudulent joinder. *See, e.g., In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002) (district court had remanded case despite fraudulent misjoinder claim; Court of Appeals agreed with defendants that "it might be concluded that misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction," but the Court was without jurisdiction to overturn district court). Even courts which accept the general proposition that joinder of plaintiffs may constitute a form of fraudulent joinder differ as to the standard to apply in evaluating such a claim. *Compare, e.g., Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (requiring "egregious" misjoinder for finding of fraudulent misjoinder), *with In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d at 147-48 (rejecting requirement of "egregiousness"); *compare Koch v. PLM Int'l, Inc.*, 1997 WL 907917, at *3 (S.D. Ala. Sept. 24, 1997) (applying federal joinder rules), *with In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d at 678-79

[7] *See, e.g., In re Silica Prods. Liab. Litig.*, 2005 WL 1593936, at *75 (finding that each plaintiff's claim should be considered in evaluating federal jurisdiction as if that claim had been severed from all the other plaintiffs' claims); *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 818 (S.D. Miss. 2002) (finding that 48 plaintiffs, only 3 of whom were non-diverse from defendants, were fraudulently misjoined and remanding only those 3 plaintiffs' claims to state court); *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003) (finding fraudulent misjoinder in six Georgia cases, each having one Georgia non-diverse plaintiff and numerous out-of-state and diverse plaintiffs); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146-47 (S.D.N.Y. 2001) (finding fraudulent misjoinder of plaintiffs because only some of multiple plaintiffs had valid claims against non-diverse defendants); *In re Fen-Phen Litig.*, slip op. at 3 (finding fraudulent misjoinder of more than 14,000 plaintiffs).

(applying state joinder rules). In the Eleventh Circuit, moreover, where an element of "egregiousness" is required for a finding of fraudulent misjoinder, the courts have not yet defined what conduct would be considered sufficiently "egregious" for that purpose.

Particularly in connection with such a newly evolving principle of law, where the boundaries and even the direction are unclear, where the standards vary from jurisdiction to jurisdiction, defendants must have room for reasonable advocacy, even if they are unsuccessful in convincing a particular court of their position. As with any effort to extend established principles to new circumstances, defendants will not always be successful in challenging this improper device. But that does not make those efforts improper, and the Court should not chill them.

Another example of plaintiffs' new anti-removal tactics also came to light in the "fen-phen" litigation. The court assigned the multidistrict litigation found substantial evidence that some defendants had colluded with the plaintiffs' bar to deny the principal defendant its statutory removal rights. *See In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d at 420-22. The colluding defendants had refused to grant required consents to the principal defendant's removals in hundreds or thousands of cases. *See id.* Without those consents, the principal defendants' removals were blocked.[8] In return, plaintiffs ultimately dismissed those co-defendants. However, the evidence of such collusion took years to uncover. Surely, a defendant in such circumstances should not be sanctioned for challenging such collusion, even if the defendant fails to convince a court of the collusion.

[8] Courts have interpreted 28 U.S.C. § 1446(b) to require that all defendants join in or consent to removal. *See, e.g., Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990).

B. Uncertainties Arising from the Time Limits in the Removal Statute Are Another Reason Defendants Must Have the Latitude to Advance Reasonable Arguments

In order that the case not proceed wastefully in state court for too long prior to removal, Congress imposed time limits on defendants' removal rights. A defendant must remove a state court case within 30 days after service. 28 U.S.C. § 1446(b). However,

> [i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action.

Id. Working within these time limits creates significant uncertainties for defendants.

A defendant having reason to believe there is fraudulent joinder but possessing incomplete evidence to that effect at the outset of the case faces a practical dilemma. If the defendant removes the case at the outset based on the limited facts then available, it risks remand for failure to meet the significant burden of demonstrating fraudulent joinder at that time. On the other hand, if the defendant does not remove

the case within the first 30 days, but does so later based on additional facts obtained in discovery, it risks an objection that the removal is untimely, that there were sufficient facts available at the outset to have supported the grounds on which the defendant subsequently removed the case. The same type of dilemma arises as the facts emerge in discovery. As developing evidence increasingly suggests fraudulent joinder, the defendant will have to make a judgment when it is first ascertainable that the case has become removable. As part of that assessment, the defendant will also need to weigh whether the evidence is yet sufficient to meet the defendant's burden of establishing fraudulent joinder. When these judgment calls are reasonable, but a federal court ultimately disagrees and finds the defendant removed either too early or too late, it would be inequitable to subject the defendant to sanctions.

Moreover, plaintiffs are well aware of the statutory time limits and often act in a manner designed inequitably to prevent defendants from removing on a timely basis. Defendants may properly challenge those tactics as inequitable. For example, in *Tedford v. Warner-Lambert Co.*, plaintiff sued a non-diverse prescribing physician along with an out-of-state drug manufacturer but signed a dismissal of the claim against the physician. However, the plaintiff did not disclose that dismissal to the manufacturer until the one-year time limit for removal had passed. When removing the case, the manufacturer successfully argued as a matter of equity that the one-year deadline should be tolled because of plaintiffs' manipulation. The court agreed. *See* 327 F.3d at 426-27; *see also, e.g., Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992) (recognizing equitable power of the court to consider exceptions to the statutory 30-day limit on removal);

Staples v. Joseph Morton Co., 444 F. Supp. 1312, 1313-14 (E.D.N.Y. 1978) (plaintiff estopped from moving to remand when he induced defendant to refrain from removing on a timely basis). However, the courts are split on whether such equitable tolling applies and it is in any event not clear what conduct triggers an equitable exception to the statutory time periods. *See, e.g.*, cases cited in *Tedford*, 327 F.3d at 426 n.4. It would be unfair and contrary to the central purposes of the removal statute to put a defendant at high risk of sanctions in order to find out the answer to this legal question in a particular jurisdiction.

C. Defendants Also Must Have the Latitude to Make Reasonable Arguments Given the Uncertainties in Seeking to Establish Fraudulent Joinder

Plaintiffs suing out-of-state defendants have not only developed new stratagems to block removal but have continued to use the older tactic of joining non-diverse defendants with no intention of pursuing a judgment or no colorable claim against the them. It is a common practice, for example, for mass tort plaintiffs suing out-of-state corporate defendants in state court to name as a co-defendant a low-level corporate employee living in that state or a local distributor of the product in question, merely to keep the case in state court and without any interest in seeking a judgment against the co-defendant. If the corporate defendant has reason to believe, as a legal or factual matter, that the local defendant is fraudulently joined, it is entirely appropriate to challenge that device. Proving fraudulent joinder, however, is often a difficult challenge for defendants. They face uncertainties even as to the procedures the district court will employ in resolving such a claim.

This phenomenon is demonstrated by the predicament of the Bankston Drugstore in rural Fayette, Mississippi, which was sued in hundreds of cases filed there and was later usually dropped from the suit. It was no secret to the courts or the parties that the only reason Bankston Drugstore was being sued was to keep the case in state court. Establishing that proposition was no simple matter, however. One court, relying on the testimony of the owner of that pharmacy before the House Judiciary Committee, explained the situation as follows:

> As the only pharmacy in Jefferson County, Mississippi, the store is named in hundreds of lawsuits involving the sale of allegedly defective drugs, including fen-phen. Hilda Bankston, the former owner of the pharmacy, testified [before the House Judiciary Committee] that because of this "lawsuit frenzy" she has had to spend innumerable hours retrieving information for potential plaintiffs, testifying in court, enduring the whispers and questions of customers and neighbors who wonder what the pharmacy did to end up in court so often, and worrying about whether her business would survive. . . . Although the pharmacy is usually dropped from the lawsuits, the costs of hiring lawyers and obtaining insurance can become prohibitive. As Ms. Bankston sees it, her "life's work was merely a means to an end for trial lawyers seeking to cash in on lucrative class actions – a back door into the Jefferson County court system."

In re Diet Drugs Prods. Liab. Litig., 220 F. Supp. 2d at 424 (internal citations omitted).

Defendants could challenge such a removal-blocking strategy by showing that the plaintiff had no good faith intention of pursuing the non-diverse defendant to judgment. *See, e.g.*, *Wilson*, 257 U.S. at 98; *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1291 (11th Cir. 1998); *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990). But proving the plaintiff's intent in bringing a lawsuit is rarely a certainty for a defendant considering removal. In rare cases, there might be direct evidence of intent. *See*, *e.g.*, *Mask v. Chrysler Corp.*, 825 F. Supp. 285, 286-87 (N.D. Ala. 1993) (plaintiff's counsel sent letter to non-diverse automobile dealership defendant joined in suit against manufacturer, stating that plaintiff did not intend to pursue the dealership to judgment); *Heimback v. A.H. Robins Co., Inc.*, No. 02-0347-S-BLW, slip op. at 2-3 (D. Id. Nov. 14, 2002) (non-diverse physician-defendant testified that patient-plaintiff had assured him that physician was joined in suit against drug manufacturer only to keep the case in state court). In other cases, a defendant might only have circumstantial evidence. By the very nature of such evidence, however, a defendant is always uncertain at the time of removal whether or not it will be able to prevail in establishing a lack of intent on that basis. *See*, *e.g.*, *Parnas v. Gen. Motors Corp.*, 879 F. Supp. 91, 94 (E.D. Mo. 1995) (evidence insufficient to demonstrate lack of intent); *Franz v. Wyeth*, No. H-04-0169, slip op. at 6-13 (S.D. Tex. Apr. 26, 2004) (proposed plaintiff agreement to dismiss non-diverse defendant if diverse defendant would agree not to remove case was insufficient evidence of lack of intent to pursue non-diverse defendant to judgment).

An alternative to proving a lack of intent to pursue the defendant would be to demonstrate that there is no reasonable possibility of plaintiff's establishing a claim against the non-diverse defendant. If the law governing liability is uncertain,

however, the courts will give the plaintiff the benefit of the doubt in ruling on a fraudulent joinder challenge to the claim against that defendant. *See*, *e.g.*, *Crowe v. Coleman*, 113 F.3d 1536, 1540 (11th Cir. 1997); *Boyer*, 913 F.2d at 111; *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981).

In some cases, plaintiffs' strategy for defeating removal is to make factual allegations in their complaint sufficient on their face to state a claim against a non-diverse defendant, even when no valid claim exists as a factual matter. *See*, *e.g.*, *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d at 422 (50 plaintiffs sued Dr. Seymour Hersh alleging that he had prescribed a drug to them, even though the evidence showed that none of the plaintiffs had been treated by or had had any contact whatever with Dr. Hersh); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d at 138-141 (non-diverse field sales representative joined in suit against drug manufacturer under state law requiring sale of the drug for liability, despite evidence that the representative had never sold the drug).

Defendants face uncertainty, however, as to how far the district court will permit them to go in introducing evidence to establish that there is no colorable claim against the non-diverse defendant. First, courts differ, even within the same circuit, as to whether their review of a fraudulent joinder claim is limited to the allegations of the complaint or whether they may consider evidence proffered by the parties. *See*, *e.g.*, *Pacheco de Perez v. AT&T Co.*, 139 F.2d 1368, 1380 (11th Cir. 1998) (fraudulent joinder determination to be made based on complaint supplemented by any affidavits and deposition transcripts); *Johnson v. Wyeth*, No. 1:02-CV-1368-TNT (N.D. Ga. Jan. 3, 2003) (determining fraudulent

joinder based in part on deposition transcripts); *Hales v. Merck & Co., Inc.*, No. 03-AR-1028-M, slip op. at 6-7 (N.D. Ala. June 26, 2003) (court would not consider non-diverse defendants' affidavits in deciding fraudulent joinder); *Legg v. Wyeth*, No. CV-04-S-0435-NE, slip op. at 10 (N.D. Ala. Apr. 27, 2004) (refusing to consider non-diverse field sales representative defendant's affidavit that she had never promoted or had anything else to do with the drug in question); *see also Reeb v. Wal-Mart Stores, Inc.*, 902 F. Supp. 185, 187-88 (E.D. Mo. 1995) (discussing the split of authority in the Eighth Circuit on whether or not to permit "piercing of the pleadings" in evaluating fraudulent joinder).

Even within a single judicial district, judges' divergent views of the limitations on piercing the pleadings can lead to different decisions based on substantially identical facts. *Compare, e.g., Clay v. Wyeth*, No. 5:04-cv-192-Oc-10GRJ, slip op. at 28 (M.D. Fla. Sept. 23, 2004) (Hodges, J.) (finding that pharmacy and drug company sales representatives were fraudulently joined because the affidavits and other evidence submitted by the parties established that there was no reasonable basis for the claims against these defendants), *with Hroncich v. Wyeth*, No. 2:03-cv-659-FTM-29SPC, slip op. at 3-4 (M.D. Fla. Jan. 12, 2004) (Steele, J.) (refusing to go beyond allegations of complaint and remanding case that involved similar facts and evidence and the same types of non-diverse defendants as in *Clay*).

Courts that permit some piercing of the pleadings, moreover, often limit the factual issues they will consider. *See, e.g., B., Inc.*, 663 F.2d at 551 ("The question of whether the plaintiff has set forth a valid claim against the in-state defendant(s) should be capable of summary determination.");

Crowe, 113 F.3d at 1541-42 (district court is to stop short of adjudicating the merits of the case); *Boyer*, 913 F.2d at 112 (recognizing uncertainty as to extent of permissible inquiry into the validity of the claim).

Particularly under these circumstances, it would be inequitable and contrary to the central purpose of the removal statute for plaintiffs' legal fees to be imposed on a defendant merely because it is unsuccessful in establishing fraudulent joinder in a particular case.

III. CONGRESS DID NOT INTEND TO GRANT HOLLOW REMOVAL RIGHTS, SUBJECTING DEFENDANTS TO SANCTIONS IF THEY ARE UNSUCCESSFUL IN OVERCOMING PLAINTIFFS' STRATAGEMS

The foregoing discussion includes only some examples of the uncertainties facing many defendants considering removing a case against them filed in state court. Plaintiffs suing out-of-state corporations have many devices available to frustrate defendants' exercise of their right to seek the neutral forum provided by the federal court. Defendants cannot always be successful in challenging those devices in the face of the uncertainties discussed above. But there is no indication in the removal statute, its legislative history or its "large objectives" that Congress intended to require defendants who acted reasonably nonetheless to pay the plaintiffs' legal fees whenever defendants are unsuccessful in upholding a removal. To the contrary, these factors weigh heavily in favor of the type of multi-factor, party-neutral standard employed by the Court of Appeals in this case. When "equitable considerations" are added to the mix, there can be no question that the equities overwhelmingly favor this Court's affirming the application of that type of standard.

CONCLUSION

For the foregoing reasons, the Court should affirm the Tenth Circuit's ruling as to the standards for determining an award of costs and fees under 28 U.S.C. § 1447(c) and as to the decision in this case.

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APPENDIX A: CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.

Appendix A

Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.

Appendix A

Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation

Appendix A

Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
Tyson Foods, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

Supreme Court, U.S.
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No. 04-1140

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. RECENT SCHOLARSHIP CONFIRMS THAT ERRONEOUS REMOVALS ARE A SIGNIFICANT AND GROWING PROBLEM.

A forthcoming scholarly article, based on empirical research into litigation trends, finds that erroneous removals are a significant and growing problem. The article is *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. Empirical Legal Stud. __ (forthcoming Nov.

2005) by Theodore Eisenberg and Trevor W. Morrison.[1] Relying on data gathered by the Administrative Office of U.S. Courts, the authors reach a conclusion that they summarize as follows: "[O]ur findings suggest that erroneous removal is a growing phenomenon, and hence an increasingly burdensome deadweight loss for the federal judicial system." *Id.* at ___; *see also id.* at ___ ("With respect to diversity cases in particular, we find a number of trends: the annual number of diversity-based removals has generally increased over the last two decades; the proportion of the federal diversity docket consisting of cases originating in federal court as removals has also increased; and the rate at which removed diversity cases are remanded has risen as well. Taken together, these trends suggest that erroneous removal is a growing phenomenon, and thus exacts a growing toll on the federal judiciary."). That phenomenon sets the backdrop for consideration of this case.

II. SECTION 1447(C) IS A FEE-SHIFTING STATUTE, NOT A PROVISION ALLOWING FEE AWARDS ONLY WHEN THEY ARE AUTHORIZED BY SOME OTHER LAW.

Respondents argue that Section 1447(c)'s language about fees—"An order remanding the case may require payment of . . . attorney fees" . . . is not a fee-shifting statute at all. Instead, say Respondents, fees can be awarded upon remanding a case only when authorized by some *other* law, such as Rule 11 or the established "bad faith" equitable exception to the American Rule. Respondents identify no case finding merit in this argument. The lower courts agree that Section 1447(c) is itself a source of fee-shifting authority. *See, e.g., Bartholemew v. Town of Collierville*, 409 F.3d 684, 686 (6th Cir. 2005) (discussing "the 1988 change [of Section 1447(c)] from a punitive to a fee-shifting statute").

[1] Pursuant to Rule 32.3, Petitioners have written to the Clerk proposing to lodge copies of the cited article in draft form.

Respondents argue that after the 1988 amendment, the relevant provision of Section 1447(c) was still simply what it had been before, when it had referred only to costs and not to fees: an abrogation of a common law rule that a court without subject matter jurisdiction lacked the power to award costs or fees *even if* those costs or fees would have been available under some other law. The fatal problem with this view is that it does not explain why Congress added the language about fees. Prior to the 1988 amendment, courts knew full well that they could award fees upon remanding a case when some source of law other than the remand statute authorized fee-shifting. The most commonly invoked basis for doing so, as seen in our opening brief, was the inherent equitable power to award fees against a party that litigated in bad faith. Courts also knew that they could impose Rule 11 sanctions based on frivolous removals. *See Ballard's Service Center v. Transue*, 865 F.2d 447 (1st Cir. 1989) (affirming order imposing such sanctions prior to 1988 amendment of Section 1447(c)); *Four Keys Leasing & Maintenance v. Simithis*, 849 F.2d 770 (2nd Cir. 1988); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216 (5th Cir. 1987). We have seen no hint that there was any question about the existence of this power.[2] Given the complete lack of evidence of uncertainty about the power to award

[2] Respondents' quotation from the Wright and Miller treatise (Brief at 19) is not evidence of such uncertainty. As the Solicitor General explains, the treatise was calling for an amendment of Section 1447(c) to make it an affirmative source of fee-shifting authority, not suggesting that an amendment was necessary to enable a remanding court to award fees that were authorized under other law. (Brief for United States at 22).

It is likely that courts and Congress, in 1988 and before, understood the existing statutory authorization of "costs" to include fees, where fees were available under some other source of law. This Court had held just that, or at least something quite close to it, in interpreting the word "costs" in the Federal Rules of Civil Procedure in 1985. *Marek v. Chesny*, 473 U.S. 1 (1985). In any event, for reasons stated in the text above there was no reason for Congress to be concerned about the issue in 1988.

fees where authorized under other law, the Congressional addition of the fee language cannot be interpreted as clearing up some non-existent uncertainty on this point.

But the addition of the reference to fees in Section 1447(c) must have meant something; words are not added to statutes for no reason. The only reading that would give meaning to the relevant language is the reading that we, and (so far as we are aware) every court that has looked at the matter, have adopted: that the amendment was itself an authorization for fee-shifting. This reading of Section 1447(c) also has the virtue of being the most natural understanding of the words. Most people, when told that a law provides that a court may award fees in a certain kind of case, certainly would not take this to mean that the court may do so *only* if some *other* law says so as well.[3]

Respondents' other arguments for reading Section 1447(c) as something other than a fee-shifting statute are also wrong. For instance, to read Section 1447(c) as a fee-shifting statute would not "clash with Fed. R. Civ. P. 11 and rules of professional responsibility, and interfere with an attorney's ethical obligation to represent his or her client zealously." (Respondents' Brief at 17 and n.30). Respondents' error is in thinking of a fee-shifting award as a punishment for forbidden actions. To allow fees against incorrectly removing defendants would not depend upon a belief that defendants and their counsel had done something that federal law positively forbids them from doing. Fee-shifting awards are primarily *incentives* and *equitable compensation* rather than *prohibitions and penal-*

[3] Respondents argue that Section 1447(c) should not be read as a fee-shifting statute because it is worded somewhat differently from some other fee-shifting statutes. (Brief at 16). But Respondents overstate the difference. In any event there is no reason to expect—indeed, to demand, as Respondents would—that a fee-shifting provision in this succinct statute about procedure and jurisdiction would be written just the same as a fee-shifting provision in a longer statute creating a new federal cause of action.

ties. A defendant will, even if this Court adopts our view, be free to remove a case on whatever non-frivolous basis it believes to be appropriate. It is just that the defendant will consider the possible cost of a fee award before deciding on that course of action, and that the plaintiff will consider the possible award when reacting to a removal of questionable validity. The wasted costs of the unnecessary procedural skirmish will simply fall on the defendant that caused it, rather than on the innocent plaintiff. Defendants will undertake questionable removals only when removal is, in their own judgment, important enough to justify the risk of a fee award. This no more interferes with an attorney's ethical obligation of zealous representation than does, say, an indisputably valid contractual fee-shifting provision.

Respondents are also wrong in contending that the legislative history promised that there was no change from existing law; the passages they quote (Brief at 15) say no such thing. Moreover, the legislative history is not (as they contend) silent about fee-shifting authority. Even if it had been silent that would not matter; laws should be interpreted to mean what their words say even if no staffer reiterated the point in some committee report. But in fact the legislative history's reference to "ensur[ing] that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal" is naturally read as a reference to fee-shifting authority, particularly given the statutory language making the point explicit. Indeed, the very word "substantive" in that passage demonstrates that the amendment was not, as Respondents claim, simply a procedural point regarding *other* substantive sources of fee-shifting authority.

In the end, Respondents seem to concede that Section 1447(c) is indeed a fee-shifting statute. They say that the statutory reference to fees "also resolved the lower federal courts' discord over the awardability of attorney fees under [Section] 1447(c)'s prior wording." (Brief at 19-20). The

"discord" was that some courts believed that Section 1447(c) was a fee-shifting statute, while others believed it was not. (Brief of Respondents at 20 n. 34). Respondents are right: the addition of the reference to fees must be understood as resolving that question. And it obviously resolved that question in favor of our view; certainly one would not resolve the discord in the opposite way by *adding* a reference to fees.

III. PLAINTIFFS WHO SUCCESSFULLY SEEK REMAND SHOULD USUALLY BE AWARDED FEES, AND THE EXISTENCE OF A REASONABLE ARGUMENT IN FAVOR OF REMOVAL IS NOT A VALID REASON TO DENY FEES.

This brings us back to the question presented: identifying the governing standard. Respondents and the Solicitor General disagree, advocating a multi-factor analysis and the *Christiansburg Garment*[4] standard respectively. Both are wrong in contending that the existence of a reasonable argument in favor of removal weighs strongly or dispositively against a fee award. They incorrectly minimize, or ignore, the points that we made in our opening brief; and they overstate the arguments in favor of their preferred standards.

A. Clues about legislative intent point towards broader availability of fee awards.

The available textual and contextual clues point towards a standard making fees the rule rather than the exception, as we showed in our opening brief. The arguments of Respondents and the Solicitor General to the contrary are incorrect.

1. There was not, despite Respondents' implication (Brief at 10-11) some consensus that costs were to be awarded under the prior version of Section 1447(c) only if the removal was unreasonable or the like. Some district court decisions used a standard of the sort that Respondents advocate. Others imposed costs seemingly as a matter of course upon remanding a case, without any finding that the removal was any worse than merely incorrect.[5] So, the legislative action in 1988 cannot be taken as ratifying any previously-utilized standard. *See Fogerty v. Fantasy*, 510 U.S. 517, 527-32 (1994) (holding that Congress could not be taken to have endorsed a certain standard, because the existing caselaw had not uniformly adopted that standard).

2. The pre-1988 cases that did adopt a *Christiansburg Garment*-like standard for awards of costs are notable in that at least some of them were driven by the statutory word "improvidently." As noted in our opening brief, the 1988 deletion of this word is a good textual clue as to the governing standard for fee-shifting. Some courts before 1988 had interpreted Section 1447(c) to mean that costs should not be awarded unless the removal was "improvident," and took that word to require some level of culpability worse than simply being wrong. It is not useful now to debate whether they were right; it is enough to note that this thinking was not uncommon.[6] Notably, at the same time it added the fee-

[4] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

[5] *See, e.g., Coleman v. North American Van Lines*, 1987 U.S. Dist. LEXIS 6395, *5 (N.D. Ill. 1987); *Cocioppe v. Superior Holsteins, III, Ltd.*, 650 F.Supp. 607, 609 (S.D. Tex. 1986); *Ryan v. Tollefson*, 118 F.Supp. 420, 423 (E.D.N.Y. 1954) (quoting local rule that called for imposition of costs on removing defendant whenever case was not removable or was improperly removed). *See also Bucary v. Rothrock*, 883 F.2d 447, 449 (6th Cir. 1989).

[6] See, *e.g., Gray v. New York Life Ins. Co.*, 906 F.Supp. 628, 630 (N.D. Ala. 1995) ("Prior to the 1988 amendments, attorneys fees to the plaintiff were rarely awarded as part of 'just costs,' which prior to 1988 could be awarded pursuant to § 1447(c) only in the event the removal was deemed 'improvident.'"); *Sage Investors v. Group W Cable*, 666 F.Supp. 186, 189 (D. Ariz. 1986) (denying costs because the "court cannot say that GW's removal action was improvident due to the confusion among the circuits on a limited partner's citizenship for diversity purposes."). Indeed, so ingrained was this notion of "improvidence" as the standard for granting costs, that it persists in some courts to this day. *Lang v. American Electric*

shifting language, Congress deleted that word "improvidently." Respondents and the Solicitor General describe this as a meaningless change. But anyone paying attention to the existing caselaw—such as the Judicial Conference, which proposed the amendment—would have known that the word was driving some courts to use a heightened standard and to deny costs. Had Congress intended a *Christiansburg Garment*-like standard for the award of fees, it surely would not have deleted the word that had impelled many courts towards that very standard.

3. We showed in our opening brief that to read Section 1447(c) as adopting the *Christiansburg Garment* standard would make the fee-shifting provision nugatory, because it would do little or nothing that was not already accomplished by Fed. R. Civ. P. 11. The Solicitor General responds (Brief at 22-24 & nn. 8-10) that the provision when interpreted this way would still not be entirely pointless, because some courts at the time were under the misimpression that Rule 11 sanctions could only be imposed in cases of subjective bad faith. But if we hypothesize with the Solicitor General that this misimpression among a few courts was what Congress was thinking of, surely it would have been more likely that the Congress would have worked to *correct* that misimpression as part of the Judicial Improvements Act, rather than tinkering with it in just this one particular procedural context.[7]

Power Co., 785 F.Supp. 1331, 1335 (N.D. Ind. 1992) (denying costs because the "court cannot find that NECA's removal was in bad faith or improvident."); *Tidwell v. Coldwater Covers, Inc.*, 2005 U.S. Dist. LEXIS 2767, *14-*15 (N.D. Ala. 2005) (denying costs because the "attempt to remove was not improvident and appears to have been arguably reasonable given the conflict among Eleventh Circuit cases on the issue of complete preemption.").

[7] In any event, there is no reason to believe that Congress actually was thinking about this difference in courts' views of Rule 11. The point is only important in that (we think) the existence of Rule 11 shows that reading the statute to incorporate the *Christiansburg Garment* rule would make it pointless. If the Court disagreed, that would merely take away the force of this particular sub-point, but it would not beyond that weigh *against* our interpretation of the statute.

4. Respondents and *amici* point out that the legislative history contains no affirmative indication that the Congress meant to adopt a presumption in favor of fees or the *Piggie Park* rule.[8] But this is not particularly probative. There was, after all, no hint in the Court's opinion in *Piggie Park* itself that there was any comment in the legislative history about what standard should govern the fee-shifting provision. So, affirmative comment in legislative history is demonstrably not, and should not become, a precondition for implementation of the *Piggie Park* rule. The theory of "the dog that did not bark" may perhaps have its place in certain sorts of cases, such as where the legislative history on the particular provision is extensive yet there is nothing to support the contention under review, or where (as in *Fogerty*[9]) the contention is that Congress did something quite odd or quite extraordinary without mentioning it. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. ___, ____, 125 S.Ct. 1453, 1465 (2005) (Stevens, J., concurring in the judgment). But where those conditions are absent, as here, the "dog that did not bark" theory has little probative value. Even the presence of statements in legislative history is useful only insofar as it provides a "reliable" guide to the interpretation of ambiguous language. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. ___, 125 S. Ct. 2611, 2626 (2005). The absence of statements to support a given contention is "reliable," if ever, only under special circumstances like those just mentioned. This case, however, involves nothing odd or extraordinary, but merely the adoption in yet one more context of a rather

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[8] *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

[9] *Fogerty*, 510 U.S. at 533-34 (relying on the absence of legislative history to refute the contention that the Congress had adopted the "British Rule," which is extraordinarily rare in American law).

common fee-shifting standard. There is no reason to require Congress to say this in the legislative history, if the other available indicia of meaning point in that direction.

5. Finally, as we noted in our opening brief, the asymmetrical nature of Section 1447(c)'s fee-shifting authority is itself indication that the point was to deter removals—not to encourage them, nor even to deter plaintiffs and defendants alike from making unreasonable arguments for or against them. Indeed it is more important to deter wrongful removals than to deter plaintiffs from incorrectly invoking federal jurisdiction; this is reflected in the fact that, while Section 1447(c) allows for fee awards, 28 U.S.C. § 1919 (allowing awards of costs but not fees upon dismissal for lack of jurisdiction) does not. These facts demonstrate that opposition to incorrect removals serves important federal interests, and that incorrect removals undermine federal interests. As seen in our opening brief, the federal interests at stake include maintaining the proper balance between state and federal spheres of authority; maintaining the proper balance between legislative and judicial authority over the boundaries of jurisdiction; avoiding waste of resources in litigation over jurisdictional issues (and, even worse, horrible waste when district courts wrongly assert jurisdiction over incorrectly removed cases); preserving the right of plaintiffs to choose the forum except where that right is limited by statute; and avoiding unnecessary disruption of the progress of litigation in state courts.

B. The large objectives at stake in the law of removal and remand support our view.

Even with what we have said thus far, our case does not wholly depend on a belief that Congress, or even the Judicial Conference, actually pondered (much less intended to answer) the question of what standard would apply.[10] It is

[10] Legislatures sometimes use vague words intentionally, to avoid having to work through disagreement about specifics; words like "may" can be legislatively useful precisely because they avoid having to ponder or reach agreement about such things. That does not stop this Court from interpreting the laws.

enough to note that Congress used the word—"may"—that invokes this Court's ability to formulate an appropriate standard, just as this Court has done for other statutes before and since. Even when this Court has set forth categorical rules to govern fee-shifting in other contexts, the Court has not required itself to suppose that Congress actually thought collectively about the issue. There was no reason to think, for instance, that Congress had actually formed a collective opinion about the circumstances under which intervenors would be liable for fees in Title VII cases; that did not stop this Court from finding an appropriate standard in *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). So it is here. As we demonstrated in our opening brief, the relevant large objectives and equitable considerations lead to a fee-shifting standard that would deter questionable removals, would encourage plaintiffs to identify and challenge them, and would equitably shift the costs of these wasteful procedural excursions to the defendants who cause them.

Respondents and their *amici*, however, argue that removal of cases is a positive good that federal law encourages, and therefore that a fee-shifting standard that would deter questionable removals is contrary to the law's "large objectives." This is, in the end, the core of their argument. They ignore the fact that, even aside from its impact on defendants' behavior, our fee-shifting standard would give plaintiffs' counsel a greater incentive to spot and litigate questionable removals, and to litigate them well. This in itself would be an important benefit, as it would reduce the number of disastrous cases in which a jurisdictional defect is spotted only after years of litigation (sometimes even only on appeal). They also ignore the equitable consideration that the cost of a pointless procedural detour ought, in fairness, to fall on the

party who was wrong rather than the one who was right. But even aside from that, Respondents and their *amici* are wrong in suggesting that routine awards of fees would, by deterring questionable removals, disserve some federal interest.

It is certainly true that the option of removal is given by statute, and therefore in a tautological sense one could say that *conferring the option* serves some interests that federal law recognizes as valid; it must, or else the removal statutes would not have been enacted. But this does *not* mean that exercise of the option is an affirmative good—much less that exercise of the option is an affirmative good when the validity of the removal is questionable. There is no public goal of encouraging *any* removals, much less of encouraging removals of questionable validity.

Take diversity cases first. If, tomorrow, half of all defendants stopped removing diversity cases (whether by carelessly missing the deadlines, or because of a preference for state courts, or pursuant to forum-selection contracts waiving the option, or what have you), there would be no detrimental effect on anyone. And if—as Respondents postulate would be the effect of the rule we advocate—only those with "obviously" removable cases tried to remove, again there would be no detrimental effect or undermining of any federal interest. There simply is no federal interest served by the removal of diversity cases; true, the *option* is given for a reason, but the exercise of the option helps no one but the defendant. So, if defendants avoided removing diversity cases because they did not want to risk the imposition of fees, that too would impair no federal interest.

The same is true as to cases removed under federal-question jurisdiction. As with diversity, defendants can give away, contract away, choose not to exercise, or lose through negligence their option of removing federal question cases; and one defendant who prefers state court can keep all other defendants from removing. There cannot be much of a federal interest served by removals even of the "obviously" removable federal-question cases, much less of the ones of questionable removability, if the option is so easily lost or foregone. And certainly there is no real federal interest that would be undermined if, suddenly, all defendants chose only to remove those federal-question cases that were "obviously" removable. The relatively rare sorts of cases in which federal-question jurisdiction is available but not obviously so are, still, equally well suited to being litigated in state court. State courts are perfectly competent to handle federal questions. *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. ___, 125 S.Ct. 2491, 2507 (2005); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).[11]

Respondents and their *amici* respond that questionable removals can be good in that they help to define the boundaries of federal subject-matter jurisdiction. But (aside from the circularity of the contention) our proposed fee-shifting standard would not interfere with clarity in that regard. First, Congress can clarify or change the boundaries at will, within constitutional limits, as it recently did with regard to class actions.[12] Second, nearly all the same sorts of jurisdictional

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[11] Congress only very rarely prefers that federal-question cases be heard in federal court rather than state court; causes of action within exclusive federal jurisdiction are the exception rather than the rule. But even as to cases arising under such statutes, the right of removal is limited by timeliness and other procedural requirements. There is no reason to encourage aggressive advocacy that wrongly attempts to expand the scope of removal jurisdiction, even when it is based on arguments about exclusive federal jurisdiction. Perhaps there are some few cases in which a defendant makes a particularly good but narrowly unsuccessful argument for removal based on a statute that provides for exclusive federal jurisdiction. At most, some such cases might represent an *exception* to the rule in favor of fees when a case is remanded, if the wrong removal actually served some legitimate federal interest other than the defendant's own self-interest. That relatively rare sort of hypothetical case, however, is no reason to reject our proposed rule altogether.

[12] "Class Action Fairness Act," Pub. L. 109-2, 119 Stat. 4 (2005).

questions can be raised and litigated in cases filed in federal courts in the first instance; there will be plenty of chances for the appellate courts to rule on novel jurisdictional questions, to the extent necessary, even if fewer cases are removed. Take, for instance, the argument of Respondents and their *amici* that the questionable but ultimately correct removal in *Grable & Sons Metal Products, Inc. v. Darue Eng. & Mfg.*, 545 U.S. ___, 125 S.Ct. 2363 (2005) allowed this Court to settle an important question on which the Circuits were split. But questionable removals were not necessary for resolution of the question; this Court's opinion shows that at least one of the decisions exemplifying the split was not a removed case but a case filed in federal court in the first place. *Id.*, 125 S.Ct. at 2366 n.2, *citing Ormet Corp. v. Ohio Power Company*, 98 F.3d 799 (4th Cir. 1996). Indeed, even issues of "complete preemption," which one might think at first blush could only be resolved by removal, can be argued in cases that remain in state court and can come to this Court through that route. A defendant who believes that a state law claim is "completely preempted" can either remove with some risk of a fee award, or stay in state court yet still contend that the state law claim is displaced by a federal cause of action. This Court could, if the issue were important, decide the issue on a case arising from the state courts; and this would resolve the removability issue for future cases.

In short, if only the "obviously" removable cases were removed, that would be to no one's detriment. But we are not asking for a prohibition against removal of cases that are not "obviously" removable. We are asking merely for a rule that would make defendants think a bit harder before undertaking a questionable removal. This ought to make defendants reserve questionable removals only for those cases in which their arguments have a high likelihood of success, and in which their preference for federal court is strong enough and the case important enough to justify the risk of a fee award. And if there are some few exceptional cases that present a

different face, where there is a particular reason to spare a defendant the consequences of its wrongful removal, the *Piggie Park* rule that we are advocating does allow for exception in unusual cases.

C. The proper limits of removal jurisdiction are contested matters of politics and policy; those limits are to be changed, if at all, through legislation rather than through aggressive advocacy of novel theories.

Amicus Product Liability Advisory Counsel, with visions of mass-tort lawyers run amok, urges that defendants must be given free rein to think creatively about removal, in order to "evolve" the boundaries of removal jurisdiction. (Brief at 8). PLAC's heated rhetoric (including its constant mischaracterization of fee awards under Section 1447(c) as "sanctions," Brief at 2, 3, 7, 13, 19, as well as its demonization of its adversaries) merely serves to underscore the fact that the boundaries of removal jurisdiction are a subject of heated debate as a matter of politics and policy. These debates implicate not only conflicts between the interests of those who are usually plaintiffs and those who are usually defendants, but also conflicts about federalism and the proper division of labor between state and federal courts. Efforts to expand the boundaries, such as those that PLAC describes in its brief, should be left for the political sphere. Litigants should not be encouraged to make those political debates into judicial ones.

The statutory boundaries of removal jurisdiction are not supposed to "evolve" by a common-law process. The boundaries are statutory, and changes in them are best made by statute. "[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with juris-

diction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992), *quoting Cary v. Curtis*, 44 U.S. 236 (1845).

Despite this, removing defendants often try to change the law of jurisdiction without legislative action. To take one example, defendants spent untold houfs in innumerable cases over the last decade or so—and caused plaintiffs' lawyers to spent untold hours as well—trying to "evolve" the law towards the notion that punitive damages could be aggregated in class actions to meet the amount-in-controversy requirement. This case was one example. Even after years of those battles, the law still did not allow such aggregation. But at the same time, PLAC's members and others were trying also to win the battle where it should have been fought exclusively: in the halls of Congress. For years their arguments were heard and rejected in the legislative sphere, until just this year they finally found success through the democratic process in the "Class Action Fairness Act." There is no reason why courts should change the removal laws on this sort of point when the legislature and executive are not yet willing to do so. Indeed, Congress has known for decades of this Court's principle that removal statutes are strictly construed,[13] and Congress could even have abrogated that principle had it wanted courts to take a more active common-law approach to questions of jurisdiction. It has not.

Similarly, PLAC errs in arguing that defendants are justified in making questionable assertions of "fraudulent joinder" on the grounds that some plaintiffs' lawyers are too crafty. Our view of fraudulent joinder, contrary to PLAC's, is that some defendants too often abuse the concept and some courts have been too forgiving of the abuses. There is room for

[13] *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 109 (1941).

debate on the point, a debate that could feature anecdotes on each side;[14] this case is not the proper forum for such an inherently political debate on a side issue. Again, the defense community recently won a significant part of the relevant battle in the legislative sphere, through modification of the "complete diversity" rule for some cases; that is where the battle should primarily be fought. And again our proposal would not forbid defendants from making "fraudulent joinder" arguments; it would merely induce them to reserve such arguments for the cases where they have a significant likelihood of success and where the stakes are high enough to justify the risk of a fee award in the event that removal fails.

Contrary to the arguments of Respondents and their *amici*, the boundaries of removal jurisdiction are not among the issues in which the ordinary give-and-take of creatively aggressive advocacy is to be encouraged. Removal jurisdiction is different from ordinary litigation skirmishes, for all the reasons we have shown; removal is not just another weapon in a furious litigator's arsenal. That is precisely why Section 1447(c) allows fee-shifting for incorrect removals without any stated requirement of culpability beyond the mere fact of remand. This Court likewise should impose no further requirement.

IV. PETITIONERS SHOULD RECEIVE A FEE AWARD.

If the Court adopts the standard that we have proposed, then fees should be awarded; Respondents do not dispute the point. (Brief at 43). If on the other hand the Court agrees with the Solicitor General that the *Christiansburg Garment* standard applies, then we do not expect that the denial of fees would be reversed; a removal that is sufficient to convince a

[14] *See, e.g., Tillman v. R. J. Reynolds Tobacco*, 340 F.3d 1277 (11th Cir. 2003).

District Judge would, in all likelihood, not be found by a higher court to be completely lacking in any reasonable basis.

If the Court adopts a looser multi-factored standard, the outcome of the case will primarily depend on how that standard treats the existence of a reasonable argument in favor of the removal. If (as Respondents urge) that is the most important factor and one that weighs heavily against a fee award, then that would likely lead to an affirmance in this case, for reasons like those mentioned just above.

Finally, the Court might adopt a multi-factored standard under which the existence of a reasonable argument in favor of removal is *not* a good reason to deny fees, as we urged as an alternative in our opening brief at page 33. In that event, a fee award would be appropriate here. Other than the existence of a reasonable basis for their removal, Respondents offer only two things weighing (in their view) against a fee award: the fact that Petitioners waited until a year after removal before raising the issue of jurisdiction, and (in Respondents' words) the "complaint's unclear allegations regarding the amounts in controversy and [Petitioners'] feigned ignorance of the falsity of their allegation that they had paid the collateral protection insurance premium." (Brief of Respondents at 43). But none of this is a good reason for denying fees.

The lapse of time between removal and motion for remand is at most relevant to how *much* should be awarded in fees; it might have some impact on what federal-court time is compensable other than the work on the remand question itself. But the question of how to arrive at the appropriate (or, in the word of the statute, "just") amount of fees is not before the Court. And the lapse of time is itself proof that Petitioners' pleadings were no improper scheme to avoid removal, or anything of the sort; had there been such a scheme the motion to remand would have been immediate. Furthermore, the reason Petitioners' complaint did not set out a precise amount

of damages is that there was no requirement that a state court complaint had to contain such a thing; again it is plain that there was no scheme to avoid removal. Therefore this cannot be counted as something weighing against Petitioners. As to the issue of the collateral protection insurance premiums, the only relevance to the removal issue is that Respondents included *all* of those premiums in their amount-in-controversy calculation even though the Complaint made it clear (JA20, ¶ 30) that Petitioners had not paid the full amount. The Court of Appeals recognized that this was *Respondents'* error, a failure on *their* part to demonstrate the requisite amount in controversy. *Martin v. Franklin Capital*, 251 F.3d 1284, 1291 & n.5 (10th Cir. 2001), JA 59. Respondents cannot shift the blame to Petitioners.

In short, Respondents have offered nothing, other than the contention that there was a reasonable basis for the removal, that weighs to any degree against an award of fees. Weighing in favor of such an award, under a multi-factor analysis, would be that the removal was legally incorrect; that it was a disfavored attempt to greatly expand the boundaries of federal removal jurisdiction; that Respondents' error has caused the expenditure of a great amount of public and private resources; and that Respondents' resources exceed those of their customers.

CONCLUSION

The judgment of the Court of Appeals should be reversed. The case should be remanded with instructions to award Petitioners their fees and expenses, or for further proceedings under such standard as the Court adopts.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MARTIN ET UX *v.* FRANKLIN CAPITAL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–1140. Argued November 8, 2005—Decided December 7, 2005

In removing petitioner Martins' state-court class action to federal court on diversity grounds, respondents (collectively, Franklin) acknowledged that the amount in controversy was not clear from the face of the state-court complaint, but argued that this requirement for federal diversity jurisdiction was nonetheless satisfied under precedent suggesting that punitive damages and attorney's fees could be aggregated in making the calculation. The District Court denied the Martins' motion to remand to state court and eventually dismissed the case with prejudice. Reversing and remanding with instructions to remand to state court, the Tenth Circuit agreed with the Martins that their suit failed to satisfy the amount-in-controversy requirement and rejected Franklin's aggregation theory under decisions issued after the District Court's remand decision. The latter court then denied the Martins' motion for attorney's fees because Franklin had legitimate grounds for believing this case fell within federal-court jurisdiction. Affirming, the Tenth Circuit disagreed with the Martins' argument that attorney's fees should be granted on remand as a matter of course under 28 U. S. C. §1447(c), which provides that a remand order "may require payment of just costs and any actual expenses, including attorney fees," but provides little guidance on when fees are warranted. The court noted that fee awards are left to the district court's discretion, subject to review only for abuse of discretion; pointed out that, under Circuit precedent, the key factor in deciding whether to award fees is the propriety of removal; and held that, because Franklin had relied on case law only subsequently held to be unsound, its basis for removal was objectively reasonable, and the fee denial was not an abuse of discretion.

Held: Absent unusual circumstances, attorney's fees should not be

Syllabus

awarded under §1447(c) when the removing party has an objectively reasonable basis for removal. Conversely, where no objectively reasonable basis exists, fees should be awarded. This Court rejects the Martins' argument for adopting a strong presumption in favor of awarding fees. The reasons for adopting such a presumption in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 *(per curiam)*, are absent here. Also rejected is Franklin's argument that §1447(c) simply grants courts jurisdiction to award costs and attorney's fees when otherwise warranted. Were the statute strictly jurisdictional, there would be no need to limit awards to "just" costs; any award authorized by other provisions of law would presumably be "just." The Court therefore gives the statute its natural reading: Section 1447(c) authorizes courts to award costs and fees, but only when such an award is just. That standard need not be defined narrowly, as the Solicitor General argues, by awarding fees only on a showing that the unsuccessful party's position was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422, and *Flight Attendants* v. *Zipes*, 491 U. S. 754, 762, distinguished. The fact that a §1447(c) fee award is discretionary does not mean that there is no governing legal standard. When applying fee-shifting statutes, the Court has found limits in "the large objectives" of the relevant Act. *E.g., Zipes*, 491 U. S., at 759. The appropriate test for awarding fees under §1447(c) should recognize Congress' desire to deter removals intended to prolong litigation and impose costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied. In light of these "large objectives," the standard for awarding fees should turn on the reasonableness of the removal. In applying the general rule of reasonableness, district courts retain discretion to consider whether unusual circumstances warrant a departure in a given case. A court's reasons for departing, however, should be "faithful to the purposes" of awarding fees under §1447(c). *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 534, n. 19. Pp. 3–9.

393 F. 3d 1143, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1140

GERALD T. MARTIN, ET UX., PETITIONERS *v.* FRANKLIN CAPITAL CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[December 7, 2005]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A civil case commenced in state court may, as a general matter, be removed by the defendant to federal district court, if the case could have been brought there originally. 28 U. S. C. §1441 (2000 ed. and Supp. II). If it appears that the federal court lacks jurisdiction, however, "the case shall be remanded." §1447(c). An order remanding a removed case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." *Ibid.* Although §1447(c) expressly permits an award of attorney's fees, it provides little guidance on when such fees are warranted. We granted certiorari to determine the proper standard for awarding attorney's fees when remanding a case to state court.

I

Petitioners Gerald and Juana Martin filed a class-action lawsuit in New Mexico state court against respondents Franklin Capital Corporation and Century-National Insurance Company (collectively, Franklin). Franklin re-

moved the case to Federal District Court on the basis of diversity of citizenship. See §§1332, 1441 (2000 ed. and Supp. II). In its removal notice, Franklin acknowledged that the amount in controversy was not clear from the face of the complaint—no reason it should be, since the complaint had been filed in state court—but argued that this requirement for federal diversity jurisdiction was nonetheless satisfied. In so arguing, Franklin relied in part on precedent suggesting that punitive damages and attorney's fees could be aggregated in a class action to meet the amount-in-controversy requirement. See App. 35.

Fifteen months later, the Martins moved to remand to state court on the ground that their claims failed to satisfy the amount-in-controversy requirement. The District Court denied the motion and eventually dismissed the case with prejudice. On appeal, the Court of Appeals for the Tenth Circuit agreed with the Martins that the suit failed to satisfy the amount-in-controversy requirement. The Tenth Circuit rejected Franklin's contention that punitive damages and attorney's fees could be aggregated in calculating the amount in controversy, in part on the basis of decisions issued after the District Court's remand decision. The Court of Appeals reversed and remanded to the District Court with instructions to remand the case to state court. 251 F. 3d 1284, 1294 (2001).

Back before the District Court, the Martins moved for attorney's fees under §1447(c). The District Court reviewed Franklin's basis for removal and concluded that, although the Court of Appeals had determined that removal was improper, Franklin "had legitimate grounds for believing this case fell within th[e] Court's jurisdiction." App. to Pet. for Cert. 20a. Because Franklin "had objectively reasonable grounds to believe the removal was legally proper," the District Court denied the Martins' request for fees. *Ibid.*

The Martins appealed again, arguing that §1447(c)

requires granting attorney's fees on remand as a matter of course. The Tenth Circuit disagreed, noting that awarding fees is left to the "wide discretion" of the district court, subject to review only for abuse of discretion. 393 F. 3d 1143, 1146 (2004). Under Tenth Circuit precedent, the "'key factor'" in deciding whether to award fees under §1447(c) is "'the propriety of defendant's removal.'" *Ibid.* (quoting *Excell, Inc.* v. *Sterling Boiler & Mechanical, Inc.*, 106 F. 3d 318, 322 (CA10 1997)). In calculating the amount in controversy when it removed the case, Franklin had relied on case law only subsequently held to be unsound, and therefore Franklin's basis for removal was objectively reasonable. 393 F. 3d, at 1148. Because the District Court had not abused its discretion in denying fees, the Tenth Circuit affirmed. *Id.*, at 1151.

We granted certiorari, 544 U. S. ___ (2005), to resolve a conflict among the Circuits concerning when attorney's fees should be awarded under §1447(c). Compare, *e.g.*, *Hornbuckle* v. *State Farm Lloyds*, 385 F. 3d 538, 541 (CA5 2004) ("Fees should only be awarded if the removing defendant lacked objectively reasonable grounds to believe the removal was legally proper" (internal quotation marks omitted)), with *Sirotzky* v. *New York Stock Exchange*, 347 F. 3d 985, 987 (CA7 2003) ("[P]rovided removal was improper, the plaintiff is *presumptively* entitled to an award of fees"), and *Hofler* v. *Aetna U. S. Healthcare of Cal., Inc.*, 296 F. 3d 764, 770 (CA9 2002) (affirming fee award even when "the defendant's position may be fairly supportable" (internal quotation marks omitted)). We hold that, absent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal. We therefore affirm the judgment of the Tenth Circuit.

II

The Martins argue that attorney's fees should be

awarded automatically on remand, or that there should at least be a strong presumption in favor of awarding fees. Section 1447(c), however, provides that a remand order "may" require payment of attorney's fees—not "shall" or "should." As Chief Justice Rehnquist explained for the Court in *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533 (1994), "[t]he word 'may' clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion." Congress used the word "shall" often enough in §1447(c)—as when it specified that removed cases apparently outside federal jurisdiction "shall be remanded"—to dissuade us from the conclusion that it meant "shall" when it used "may" in authorizing an award of fees.

The Martins are on somewhat stronger ground in pressing for a presumption in favor of awarding fees. As they explain, we interpreted a statute authorizing a discretionary award of fees to prevailing plaintiffs in civil rights cases to nonetheless give rise to such a presumption. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam)*. But this case is not at all like *Piggie Park*. In *Piggie Park*, we concluded that a prevailing plaintiff in a civil rights suit serves as a "'private attorney general,'" helping to ensure compliance with civil rights laws and benefiting the public by "vindicating a policy that Congress considered of the highest priority." *Ibid*. We also later explained that the *Piggie Park* standard was appropriate in that case because the civil rights defendant, who is required to pay the attorney's fees, has violated federal law. See *Flight Attendants* v. *Zipes*, 491 U. S. 754, 762 (1989) ("Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes").

In this case, plaintiffs do not serve as private attorneys general when they secure a remand to state court, nor is it

reasonable to view the defendants as violators of federal law. To the contrary, the removal statute grants defendants a right to a federal forum. See 28 U. S. C. §1441 (2000 ed. and Supp. II). A remand is necessary if a defendant improperly asserts this right, but incorrectly invoking a federal right is not comparable to violating substantive federal law. The reasons for adopting a strong presumption in favor of awarding fees that were present in *Piggie Park* are accordingly absent here. In the absence of such reasons, we are left with no sound basis for a similar presumption. Instead, had Congress intended to award fees as a matter of course to a party that successfully obtains a remand, we think that "[s]uch a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment." *Fogerty, supra,* at 534.

For its part, Franklin begins by arguing that §1447(c) provides little guidance on when fees should be shifted—because it is not a fee-shifting statute at all. According to Franklin, the provision simply grants courts jurisdiction to award costs and attorney's fees when otherwise warranted, for example when Federal Rule of Civil Procedure 11 supports awarding fees. Although Franklin is correct that the predecessor to §1447(c) was enacted, in part, because courts would otherwise lack jurisdiction to award costs on remand, see *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 386–387 (1884), there is no reason to assume Congress went no further than conferring jurisdiction when it acted. Congress could have determined that the most efficient way to cure this jurisdictional defect was to create a substantive basis for ordering costs. The text supports this view. If the statute were strictly jurisdictional, there would be no need to limit awards to "just" costs; any award authorized by other provisions of law would presumably be "just." We therefore give the statute its natural reading: Section 1447(c) authorizes courts to

award costs and fees, but only when such an award is just. The question remains how to define that standard.

The Solicitor General would define the standard narrowly, arguing that fees should be awarded only on a showing that the unsuccessful party's position was "frivolous, unreasonable, or without foundation"—the standard we have adopted for awarding fees against unsuccessful plaintiffs in civil rights cases, see *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421 (1978), and unsuccessful intervenors in such cases, see *Zipes, supra*, at 762. Brief for United States as *Amicus Curiae* 14–16. But just as there is no basis for supposing Congress meant to tilt the exercise of discretion in *favor* of fee awards under §1447(c), as there was in *Piggie Park*, so too there is no basis here for a strong bias *against* fee awards, as there was in *Christiansburg Garment* and *Zipes*. The statutory language and context strike us as more evenly balanced between a pro-award and anti-award position than was the case in either *Piggie Park* or *Christiansburg Garment* and *Zipes;* we see nothing to persuade us that fees under §1447(c) should either usually be granted or usually be denied.

The fact that an award of fees under §1447(c) is left to the district court's discretion, with no heavy congressional thumb on either side of the scales, does not mean that no legal standard governs that discretion. We have it on good authority that "a motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike. See Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 758 (1982). For these reasons, we have often limited courts' discretion to award fees despite the absence of express legislative restrictions. That is, of course, what

we did in *Piggie Park*, *supra*, at 402 (A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust"), *Christiansburg Garment*, *supra*, at 422 ("[A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless"), and *Zipes*, 491 U. S., at 761 (Attorney's fees should be awarded against intervenors "only where the intervenors' action was frivolous, unreasonable, or without foundation").

In *Zipes*, we reaffirmed the principle on which these decisions are based: "Although the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." *Id.*, at 758. *Zipes* also explains how to discern the limits on a district court's discretion. When applying fee-shifting statutes, "we have found limits in 'the large objectives' of the relevant Act, which embrace certain 'equitable considerations.'" *Id.*, at 759 (citation omitted).*

By enacting the removal statute, Congress granted a right to a federal forum to a limited class of state-court defendants. If fee shifting were automatic, defendants might choose to exercise this right only in cases where the right to remove was obvious. See *Christiansburg Garment*, *supra*, at 422 (awarding fees simply because the party did not prevail "could discourage all but the most airtight claims, for seldom can a [party] be sure of ultimate success"). But there is no reason to suppose Congress meant to confer a right to remove, while at the same

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*In *Fogerty*, we did not identify a standard under which fees should be awarded. But that decision did not depart from *Zipes* because we granted certiorari to decide only whether the same standard applied to prevailing plaintiffs and prevailing defendants. See *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 521 (1994). Having decided this question and rejected the claim that fee shifting should be automatic, we remanded to the Court of Appeals to consider the appropriate test in the first instance. *Id.*, at 534–535.

time discouraging its exercise in all but obvious cases.

Congress, however, would not have enacted §1447(c) if its only concern were avoiding deterrence of proper removals. Instead, Congress thought fee shifting appropriate in some cases. The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff. The appropriate test for awarding fees under §1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

In light of these "'large objectives,'" *Zipes*, *supra*, at 759, the standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. See, *e.g.*, *Hornbuckle*, 385 F. 3d, at 541; *Valdes* v. *Wal-Mart Stores, Inc.*, 199 F. 3d 290, 293 (CA5 2000). In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. When a court exercises its discretion in this manner, however, its reasons for departing from the general rule should be "faithful to the purposes" of awarding fees under §1447(c). *Fogerty*, 510 U. S., at 534, n. 19; see also *Milwaukee* v. *Cement Div., National Gypsum Co.*,

515 U. S. 189, 196, n. 8 (1995) ("[A]s is always the case when an issue is committed to judicial discretion, the judge's decision must be supported by a circumstance that has relevance to the issue at hand").

* * *

The District Court denied the Martins' request for attorney's fees because Franklin had an objectively reasonable basis for removing this case to federal court. The Court of Appeals considered it a "close question," 393 F. 3d, at 1148, but agreed that the grounds for removal were reasonable. Because the Martins do not dispute the reasonableness of Franklin's removal arguments, we need not review the lower courts' decision on this point. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.